SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 503.

THE UNITED STATES, APPELLANT,

vs.

LEE YEN TAI.

ON CERTIFICATES FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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14630—02

1 United States circuit court of appeals, second circuit.

THE UNITED STATES, APPELLANT,
vs.
LEE YEN TAI.

Appeal from order of U. S. district court, southern district of New York, discharging prisoner upon habeas corpus.

This cause coming on for hearing before this court, a question of law arose, concerning which this court desires the instructions of the Supreme Court for its proper decision.

The facts out of which the question arose are as follows:

On the sixth day of October, 1900, Lee Gin Moy came into the United States from China, being then and there a Chinese person and laborer, and not being a diplomatic or other officer of the Chinese, or any other government, and without producing the certificate required of a Chinese person seeking to enter the United States. On the eighth day of the same month he was arrested under a warrant issued by a United States commissioner for the northern district of New York. Upon a hearing before the commissioner it was held that said Lee Gin Moy came from China, that he had not made it appear to the commissioner
2 that he was a subject or a citizen of some other country than China, that he was a Chinese person and laborer, had unlawfully entered the United States, and was not lawfully entitled to be or remain in the United States. Thereupon said commissioner made an order for his deportation. While the marshal had him in custody and in process of deportation, habeas corpus was issued by the district court, and upon a hearing the petitioner was discharged upon giving bail for his appearance as may be determined by any final order on appeal. Appeal was duly taken to this court.

Upon argument being had it appeared that a question of law was presented, the answer to which involved the construction of a treaty made under the authority of the United States, which question is as follows:

Question. Is section 12 of "An act to execute certain treaty stipulations relating to the Chinese, approved May 6th, 1882," as amended by section 3 of the amendatory act of July 5, 1884, repealed by the treaty or convention with China of December 8, 1894?

In accordance with the provisions of section 6 of the act of Congress of March 3, 1891, entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," the foregoing question of law is by the court of appeals of the second circuit certified to the Supreme Court of the United States; and

3 It is ordered that the clerk transmit the foregoing certificate under the seal of this court to the clerk of the Supreme Court of the United States at the city of Washington.

Dated December 17th, 1901.

WM. J. WALLACE,
Circuit Judge.
E. HENRY LACOMBE,
Circuit Judge.
W. E. TOWNSEND,
District Judge.

4 United States circuit court of appeals, second circuit.

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing certificate in the case entitled The United States vs. Lee Yen Tai was duly filed and entered of record in my office by order of said court on the 17th day of December, 1901, and as directed by said court the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

Dated New York, December 17th, 1901.

[SEAL.] WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

5 (Indorsed:) United States circuit court of appeals, second circuit. The United States, appellant, vs. Lee Yen Tai. Certificate. Received. Office Supreme Court of U. S., Dec. 18, 1901. United States circuit court of appeals, second circuit. Filed Dec. 17, 1901. William Parkin, clerk.

6 (Indorsed:) Certificate. File No., 18356, U. S. C. C. of appeals, 2nd circuit. Term No., 503. The United States, appellant, vs. Lee Yen Tai. Filed December 18, 1901.

7 United States circuit court of appeals, second circuit.

THE UNITED STATES, APPELLANT,
vs.
LEE YEN TAI.

Appeal from order of U. S. district court, southern district of New York, discharging prisoner upon habeas corpus.

This cause coming on for hearing before this court, a question of law arose concerning which this court desires the instructions of the Supreme Court for its proper decision.

The facts out of which the question arose are as follows:

On the eighth day of October, 1900, complaint was made under oath before a commissioner of the United States for the northern district of New York, charging that Lee Gin Moy, alias Lee Yen Tai, on the sixth day of October, A. D. 1900, "did unlawfully come into the United States from China, he being then and there a Chinese person and laborer, and not being a diplomatic or other officer of the Chinese or any other Government, and without producing the certificate required of Chinese persons seeking to enter the United States, and that he was not entitled to be or remain within the United States." A warrant for said defendant's arrest was issued by said United States commissioner on the same day, and after a hearing before said commissioner he issued a warrant of deportation in which the following adjudication was placed on record:

8 "I now hereby find and adjudge that the said Lee Gin Moy is a Chinese person and laborer; that he is not a diplomatic or other officer

of the Chinese, or of any other Government, and unlawfully entered the United States as charged in said complaint; and I further adjudge him, said Lee Gin Moy, guilty of not being lawfully entitled to be or remain in the United States." Said defendant's immediate removal to China by the United States marshal for said northern district of New York upon said warrant was ordered by said commissioner. While the marshal had him in custody, and in process of deportation, habeas corpus was issued by the district court for the southern district of New York. The petition upon which the writ of habeas corpus issued averred, among other things, that said Lee Yen Tai was a merchant having an interest of one thousand dollars ($1,000) in the capital of the firm, and is not a laborer, and has not been a laborer, but is a merchant and member of a firm specified in the petition, and has always been a merchant since he had any status.

Before the district court the prisoner was produced, and a return made which included the aforesaid warrant of deportation; said return was traversed and no evidence as to defendant's status other than the allegations in the aforesaid petition and return was before the district court. Upon the hearing in the district court the petitioner was discharged upon giving bail for his appearance as may be determined by any final order on appeal. Appeal was duly taken by the United States to this court.

Upon argument being had, it appeared that a question of law
9 was presented, the answer to which involved the construction of a treaty made under the authority of the United States, which question is as follows:

Question. Is section 12 of "An act to execute certain treaty stipulations relating to the Chinese, approved May 6th, 1882," as amended by the amendatory act of July 5, 1884, and continued in force by section 1 of the act of May 5th, 1892, repealed by the treaty or convention with China proclaimed December 8th, 1894?

In accordance with the provisions of section 6 of the act of March 3, 1891, entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," the foregoing question of law is by the court of appeals of the second circuit certified by this amended certificate to the Supreme Court of the United States; and

It is ordered that the clerk transfer the foregoing certificate under the seal of this court to the clerk of the Supreme Court of the United States at the city of Washington.

Dated December 20th, 1901.

WM. J. WALLACE,
Circuit Judge.
E. HENRY LACOMBE,
Circuit Judge.
W. K. TOWNSEND,
District Judge.

10 United States circuit court of appeals, second circuit.

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing amended certificate in the case entitled the United States against Lee Yen Tai was

duly filed and entered of record in my office by order of said court on the 20th day of December, 1901, and as directed by said court the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

Dated New York, December 20th, 1901.

[SEAL.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

11 (Indorsed:) United States circuit court of appeals, second circuit. United States v. Lee Yen Tai. Amended certificate. Received office Supreme Court of U. S., Dec. 21, 1901. United States circuit court of appeals, second circuit. Filed Dec. 20, 1901, William Parkin, clerk.

(Indorsement on cover:) File No. 18356. U. S. C. C. of appeals, 2nd circuit. Term No. 503. The United States, appellant, vs. Lee Yen Tai. Amended certificate. Filed December 23rd, 1901.

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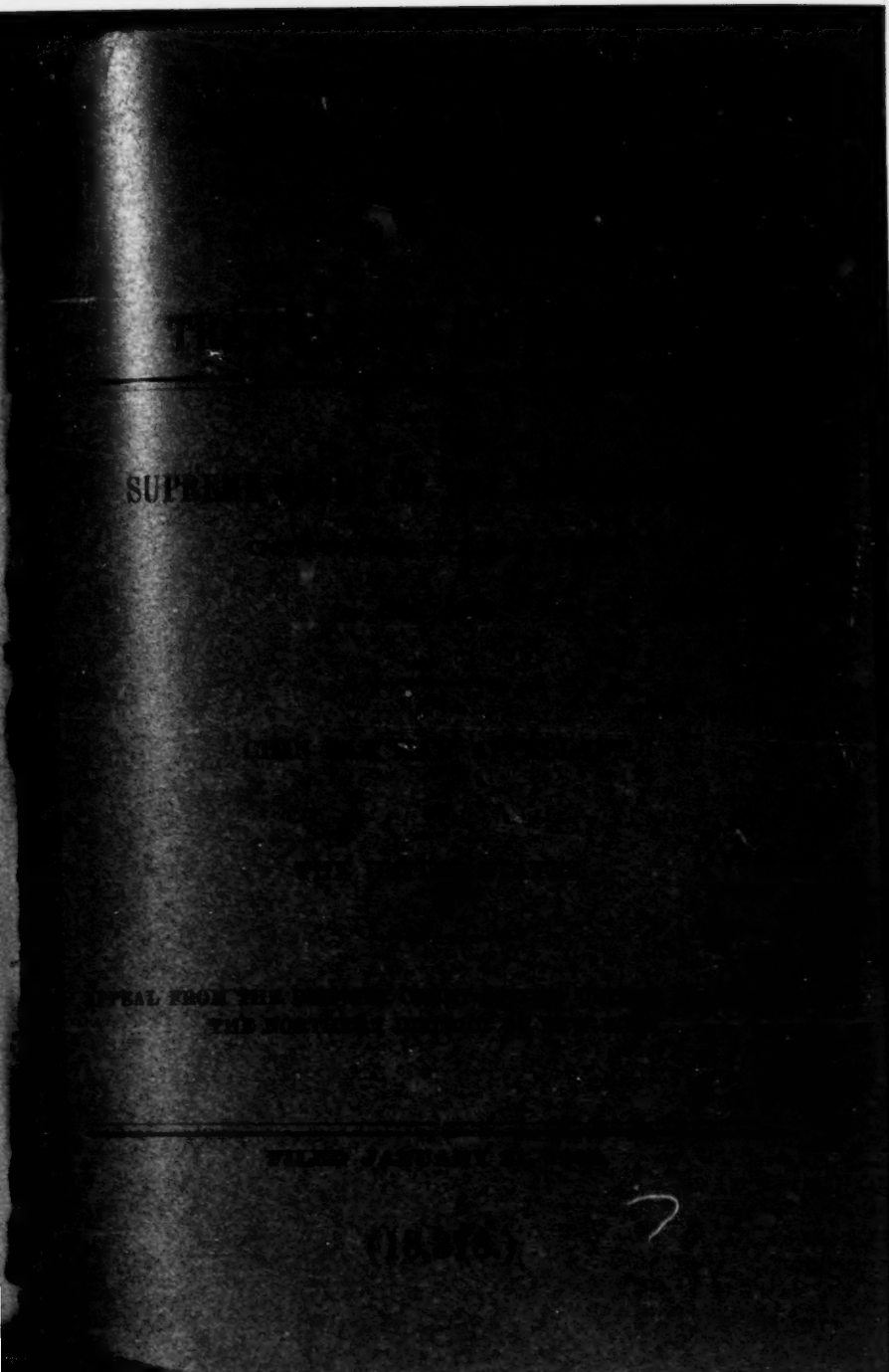

(18,378.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 525.

CHIN BAK KAN, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 22, 1902.

1 *Petition for Appeal from Decision of U. S. Commissioner.*

United States District Court, Northern District of New York.

UNITED STATES OF AMERICA
against
CHIN BAK KAN, Defendant.

The above-named defendant feeling aggrieved by the order made and entered on the 20th day of July, 1901, in the above-entitled action by Hon. Fred W. Dudley, United States commissioner, in and for the said district, by which it was adjudged that said defendant was a Chinese person found unlawfully in the United States, and that he should be deported to the Empire of China, he does hereby appeal from the said order to the judge of the said United States district court, in and for the northern district of New York, for the reasons specified in the assignment of errors, which is filed herewith; and he prays that this appeal may be allowed and that a transcript of the record, proceedings, and papers upon which the said order was made, duly authenticated, may be sent to the said judge.

Dated July 27th, 1901.

Yours, etc.,

JOHN B. RILEY,
Attorney for Defendants.

Office & post-office address: Plattsburgh, N. Y.

The foregoing appeal is allowed.

A. C. COXE.

2 *Affidavit on Appeal from Decision of U. S. Commissioner.*

United States District Court, Northern District of New York.

UNITED STATES OF AMERICA, Plaintiff,
against
CHIN BAK KAN, Defendant.

UNITED STATES OF AMERICA,
Northern District of New York, } ss:

John B. Riley, being duly sworn, says: That he is the attorney for the defendant in the above-entitled cause, and, upon information and belief, alleges that the order made by the commissioner herein is erroneous and against the just rights of the said defendant, for the following reasons:

First. The commissioner erred in refusing to discharge the defendant upon the evidence produced upon the trial of this cause.

Second. That the commissioner on such trial rejected proper evidence showing the rights of the defendant to be and remain in the United States, and admitted immaterial, improper and incompetent testimony.

Third. For other errors appearing in the record of said trial.

JOHN B. RILEY.

Subscribed and sworn to before me this 27th day of July, 1901.
D. J. CLEARY,
Notary Public.

3 *Order Allowing Appeal from Decision of U. S. Commissioner.*

United States District Court, Northern District of New York.

UNITED STATES OF AMERICA, Plaintiff,
against
CHIN BAK KAN, Defendant.

On this 31st day of July, 1901, it is ordered, that the appeal be allowed as prayed for.

And it is further ordered that a copy of the petition for appeal, assignment of error on appeal and order allowing the appeal be served upon the United States attorney, and that service be made forthwith by mail, and that a copy of the said papers be served upon the said United States commissioner, Hon. Fred W. Dudley, and Warren Dow, deputy United States marshal.

And it is further ordered that the plaintiff, through its attorney, Hon. George B. Curtiss, be and appear at a session of the United States district court, in and for the northern district of New York, appointed to be held at the city of Utica on the 10th day of Sept., 1901, pursuant to a notice of appeal and allowance thereof filed in the clerk's office of the northern district of New York, wherein The United States of America is plaintiff and Chin Bak Kan is defend-
ant, to show cause, if any, why the judgment and order
4 rendered against the said defendant, as in the said notice of
appeal mentioned, should not be set aside and justice done to the parties in that behalf.

And it is further ordered that the said commissioner, Hon. Fred W. Dudley, make return to this court of all papers and proceedings had before him, set forth in the notice of appeal herein.

And it is further ordered that all proceedings be stayed pending this appeal.

A. C. COXE, *U. S. J.*

Indorsed: Petition, affidavit & order. Filed Aug. 3, 1901. W. S. Doolittle, clerk.

5 United States Commissioner's Court, Northern District of New York.

UNITED STATES OF AMERICA
vs.
CHIN BAK KAN.

To the district court of the United States for the northern district of New York:

Pursuant to the annexed writ, I the undersigned, do respectfully return to the said court that the following are all the proceedings

taken in the above-entitled action, including all the evidence given therein, and the judgment rendered therein, except the exhibits received in evidence, which are not in my possession.

Dated this 6th day of September, 1901.

FRED W. DUDLEY,
United States Commissioner, Northern Dist. of New York.

6 United States Commissioner's Court, Northern District of New York.

UNITED STATES OF AMERICA
against
CHIN BAK KAN.

Hearing had in the above-entitled case before William V. S. Woodward, Esq., United States commissioner, at the court-house, in Plattsburgh, New York, on the 27th day of April, 1901, 3 o'clock, p. m.

Appearances.

Thomas F. Dwyer, Esq., appears for United States.
Hon. John B. Riley appears for defendant.
Defendant in court in charge of Marshal Dow.
Frank C. Parks, sworn as interpreter.
The counsel for the defendant admits that the defendant is a Chinese person and not a member of the exempt class, and that he came into the United States from the Dominion of Canada.

7 GONG WING, sworn as a witness in behalf of the defendant, testified as follows:

Direct examination by Mr. RILEY:

Q. How old are you?
A. Forty.
Q. How long since you first came to the United States?
A. Twenty-five years.
Q. You landed where?
A. San Francisco.
Q. How long did you remain there?
A. Ten years.
Q. Where did you live?
A. No. 847 Dupont St., San Francisco.
Q. Then where did you go?
A. Came to Chicago.
Q. How long did you stay there?
A. Three years.
Q. What street and number?
A. Sixteenth St., I forgot the number.
Q. Then where?
A. Went back to China.
Q. How many years did you stay there?

A. Two years.
Q. Then where?
A. Came back to the United States, to New York.
Q. What place?
A. No. 19 Mott St.
Q. How long did you stay there?
A. A few months.
Q. Then where?
A. No. 239 West 37th St.
Q. How long did you stay there?
A. Six years.
Q. Then where did you go?
A. Went back to China from New York.
Q. How long did you stay in China?
A. Two years.
Q. Then where?
A. Came back to United States, to New York.
Q. What place?
A. No. 496 Seventh Ave.
Q. How long did you stay there?
A. About two years, not quite two years.
Q. Then where?
A. I am there now.
Q. Do you know the defendant, Chin Bak Kan?
A. Yes, I do.
8 Q. Is he related to you?
A. My sister's boy.
Q. Do you know where he was born?
A. Born in San Francisco.
Q. Where?
A. No. 847 Dupont St.
Q. Were you living in the same house at the time of his birth?
A. Yes, sir.
Q. Living as a member of your sister's family?
A. Yes, sir.
Q. How long did you know the defendant in San Francisco?
A. I knew him for the first seven years I was there in San Francisco.
Q. How old is the defendant now?
A. Twenty-two years old.
Q. Where did you next see the defendant?
A. In China.
Q. How long ago, when was the last time you saw him in China?
A. About two years ago I saw him in China.
Q. What was your sister's husband's name?
A. Chin Ying.
Q. Was he living in San Francisco at the time the defendant was born?
A. Yes, sir.
Q. What was his business there?

A. Chinese grocery and Japanese goods.
Q. At what number, what place?
A. *No.* 847 *Dupont St.*
Q. Did he occupy the first floor?
A. Yes, sir.
Q. What was on the second floor?
A. My sister lived there.
Q. How many stories to the building?
A. Three stories.
Q. What was the third floor used for?
A. Rooms.
Q. Where were you born in China?
A. Sun Ning district, Tai Young Mee.
Q. How often did you see the defendant in China?
A. Very frequently, sometimes three times a month, sometimes twice a month and sometimes once a month.

9 Q. Can you point out the defendant?

A. Witness points out the defendant.

Cross-examination by Mr. DWYER:

Q. Have you got a labor certificate?
A. Yes, sir.

Q. Witness requested to produce his labor certificate?
A. Certificate produced.
(Certificate shown witness.)

Q. Is that your certificate?
A. Yes, sir.

Mr. Dwyer offers certificate in evidence for identification of the witness.

The defendant's counsel objects upon the ground that it is incompetent, immaterial and the defendant is under no obligation to produce it; that it is not binding upon the defendant, but only for the protection of the witness.

Objection overruled.

Certificate received in evidence

Marked Plaintiff's Exhibit A.

Labor certificate, No. 28,108, issued to Gong Wing, on the 12th day of February, 1894, at New York, by Ferdinand Eidman, collector of internal revenue, third district of New York.

Q. What year did you first come to the United States?
A. Second year of Kwong Suey.
Q. Where did you land when you came to the United States the first time?
A. San Francisco.
Q. What steamer did you come over on?
A. Pekin.
Q. How old were you when you came?

A. Fifteen years old.
Q. What did you do while you were in San Francisco?
A. Cook.
Q. Who did you cook for?
A. I cooked for Mr. General Coffield.
Q. How long did you cook for Mr. Coffield?
A. Two years.
Q. What did you do then?
A. Worked for Hicksley.
Q. How long did you remain there?
A. About six years.
Q. Then where did you go?
A. Different places in a week or so, so many I forgot where.
Q. When did your sister come to San Francisco?
A. My sister and her husband came the same time I did.
Q. How long did your sister remain in San Francisco?
A. She lived there ten years.
Q. Was she married when she came or was she married in San Francisco?
A. Married in China.
Q. Where is your sister now?
A. In China.
Q. Had your sister ever been back to the United States since she went back with this defendant?
A. No, sir.
Q. Where is your brother-in-law?
A. In China now.
Q. When did he go back to China?
A. He went home at the same time my sister and her boy went home; they went back to China together.
Q. What year was this nephew of yours born in?
A. Fifth year of Kwong Suey.
Q. What business was your brother-in-law in in San Francisco?
A. Chinese grocery and Japanese goods.
Q. What was the name of the firm?
A. Sang Wah.
Q. Is any of that firm still there?
A. Yes, sir.
Q. Which of the members of the firm are there now?
A. I don't know who are there now.
Q. What year did you go back to China the first time?
A. I don't know; the 17th or 18th year of Kwong Suey.
Q. What did you do while you were in Chicago?
A. Laundry.
Q. At what number?
A. I forgot the number, but 16th street.
Q. Did you run a laundry yourself or work for somebody else?
A. Myself.
Q. Where did you go from Chicago?
A. Went back to China.
Q. What year was that?

A. About the 17th or 18th year of Kwong Suey.
Q. Where did you land when you came back from China the second time?
A. Vancouver.
Q. What year was that?
A. Twenty-fifth year of Kwong Suey.
Q. What way did you go out when you went back home?
A. Went out by the way of Malone.
Q. The first time?
A. The last time.
Q. What way did you go back the first time?
A. Way of San Francisco and came back by the way of San Francisco.
Q. Did you have to take out any papers the first time you went back to China, did you file any papers with the collector at San Francisco?
A. I don't know; I went home and came back, and didn't file any papers at that time.
Q. The first time?
A. Yes, sir.
Q. You took this paper out in New York?
A. Yes, sir.
Q. And you made a sworn application at the time you took out the paper?
A. No; I didn't make any application.
Q. You didn't make any application?
A. No, sir.
Q. How did you get this paper?
12 A. There was a white man in New York who sells wholesale laundry supplies, and he went and got it for me.
Q. You didn't go down to the office at all?
A. He went with me.
Q. When you got this paper you had to make out a paper and sign it?
A. Yes, sir; I signed my name.
Q. Is that statement true?
A. Yes, sir.
Q. Did you ever appear in court before in a case of this kind?
A. No, sir; never.
Q. This is the first time you ever appeared in court as a witness?
A. Yes, sir.
Q. How many children did your sister have?
A. Only this one.
Q. This one boy?
A. Yes, sir.
Q. How did you know this boy was here?
A. A few days ago I got a letter from him saying that he was here.
Q. Where is that letter?
A. I destroyed it after I read it.
Q. What did you destroy it for?

A. Nothing particular; I didn't think there was anything particular, and I destroyed it.

Q. Do you destroy your letters?

A. All the letters I receive from home or anywhere else I destroy them.

Q. What year did you go back to China the second time?

A. Twenty-third year of Kwong Suey.

Q. What year did you return?

A. Next May it will be two years since I came back.

Q. You say you lived in Dupont St. in San Francisco for ten years?

A. Yes, sir.

13 Q. What kind of a building was this that you lived in with your sister?

A. Brick building.

Q. How many stories high?

A. Three stories high.

Q. Is that building still there?

A. Yes, sir.

Q. You didn't know that this boy was coming or was here until you received this letter from him in Plattsburgh, did you?

A. Between two or three months I got a letter from home saying that he was coming and then a month ago I received a letter from Montreal.

Q. Have you got any of those letters?

A. No, sir.

Q. Who wrote you from here that he was in jail in Plattsburgh?

A. The boy himself wrote to me.

Q. You said you were a member of your sister's family while you were in San Francisco?

A. Yes, sir.

Q. How far did Gen. Coffield live from your sister's?

A. Santa Favro.

Q. How far is it from San Francisco?

A. About thirty miles.

Q. Did you spend every Sunday with your sister?

A. Sometimes every week, sometimes twice a week and sometimes once a week.

Q. Who did the cooking for Gen. Coffi*l*ed while you were away?

A. Some hired girls, he had a few hired girls besides me.

Q. Was Gen. Coffield in the army or retired from the army?

A. Yes, sir, but don't know where he belonged.

Q. Then he was stationed at the garrison?

A. I don't know but I know I cooked for him.

Q. Any soldiers around there?

A. No, only a few.

14 Q. How large a family did this Gen. Coffield have?

A. Himself, his wife, his nephews, his cousins.

Q. What year did you cook for Gen. Coffield?

A. I can't tell all, it has been so long.

Q. Was it the first two years you were in the United States or

the last before you went back to China, that you worked for Gen. Coffield?

A. After I came to the United States about two years, then I went to cook for him.

By the COURT:

Q. How old were you when you came to United States?
A. Fifteen years old.
Q. What did you do when you were home in China?
A. School.
Q. What was your father's business?
A. He had a business in Hong Kong.
Q. What was his business?
A. Money exchange.
Q. Is he living now?
A. Yes, sir; he is living, but he is not living in Hong Kong now, he is so old he is home.
Q. Where is his home?
A. Tai Young Bee.
Q. Sun Ning district?
A. Yes, sir.
Q. That is the same place you told you came from?
A. Yes, sir.
Q. Where does your sister live in China?
A. Low Hot.
Q. How far is that from where your father lived?
A. About two miles.
Q. How many children has she?
A. Only this one.
Q. That is all?
A. Yes, sir.

By Mr. DWYER:

Q. How many brothers and sisters have you got?
A. Only one brother and one sister.

Case adjourned to the 6th day of May, 1901, 9 o'clock a. m.

15 United States Commissioner's Court, Northern District of New York.

UNITED STATES OF AMERICA
against
CHIN BAK KAN.

Adjourned hearing had in the above-entitled case before Hon. William V. S. Woodward, United States commissioner, at Plattsburgh, New York, on the 17th day of May, 1901, 9 o'clock, a. m.

Appearances.

Same appearances as on last hearing.
Defendants in court in person.

TERRANCE F. McGOWAN, sworn as a witness in behalf of the United States, testified as follows:

Direct examination by Mr. OWEN:

Q. What is your business, Mr. McGowan?
A. Deputy collector of internal revenue, third district of New York.
Q. And you have been such deputy collector how long?
A. Since June 20th, 1898.
Q. Have you the application upon which certificate No. 28,108 was issued to Gong Wing?
A. Yes, sir.
Q. Where was that application taken from by you?
A. From the office of the collector of internal revenue, third district of New York.
16 Q. And was on file as a public record, was it?
A. Yes, sir.
Q. And was taken by you from the files of the office of the collector of internal revenue, third district of New York.
A. Yes, sir.
Q. (Paper shown witness.) Is that the application?
A. Yes, sir.

Application marked Exhibit B for identification.

Cross-examination by Mr. RILEY:

Q. From whom did you get this application, Exhibit B?
A. From Ferdinand Eidman, collector of internal revenue, third district of New York.
Q. Where was he when he gave it to you?
A. In the office of the collector of internal revenue, third district of New York.
Q. That is all you know about its being on file, that it was delivered to you by the collector?
A. That is all.
Q. Were you a deputy collector of internal revenue seven years ago?
A. Yes, sir.
Q. Do you know a Chinese person by the name of Gong Wing?
A. No, sir.
Q. You have no knowledge that Gong Wing signed Exhibit B.
A. No, sir.
Q. You have no personal knowledge that Plaintiff's Exhibit B was taken from the files of the office of the collector of internal revenue, third district of New York?
A. Yes, sir, I have personal knowledge.
Q. You saw it taken from the files of the office?
A. I took it from the files of the office myself with the directions of the collector.

17 United States Commissioner's Court, Northern District of New York.

UNITED STATES OF AMERICA
against
CHIN BAK KAN.

Adjourned hearing had in the above-entitled action before Hon. Fred W. Dudley, United States commissioner, at the grand jury room in the court-house, in the village of Plattsburgh, New York, on the 10th day of July, 1901.

Appearances.

Hon. H. E. Owen, assistant United States attorney, appears for the United States.

R. M. Moore, Esq., and John B. Riley, Esq., of counsel, appear for the defendants.

Defendant in court in charge of Marshal Dow.

Thomas W. G. Wallace sworn as interpreter.

LEE SING, sworn as a witness in behalf of the United States, testified as follows:

Direct examination by Mr. OWEN:

Q. How old are you?
A. Forty-one.
Q. Where were you born?
A. China.
Q. How long have you been in the United States?
A. Twenty-seven years.
Q. Do you know a Chinese person by the name of Gong Wing?
A. Yes, sir.
18 Q. Do you know where he lives now?
A. No. 16 Pell St., New York.
Q. When did you first know him?
A. He arrived on the City of Pekin, in July, 1879.
Q. Where did you first see him?
A. First saw him in San Francisco when he was arriving.
Q. At the wharf?
A. As soon as he was at the wharf, when he was landing.
Q. What occasion did you have to go to the wharf?
A. I went down there to meet some cousins.
Q. Do you know where he went from the wharf?
A. He went to the store of Kwong Yet Woo, 802 Commercial St.
Q. Any Chinese women with him at the wharf or accompanied him to 802 Commercial St.?
A. No, sir.
Q. Where did you live in San Francisco?
A. No. 830 Dupont street.
Q. Do you know what was located at 847 Dupont St., during the years you lived there?
A. Wong Hung.

Q. How long did you live in San Francisco?
A. Eleven years.
Q. How many stories to that building, No. 847 Dupont St.?
A. Three floors.
Q. What was on the first floor?
A. Grocery.
Q. What was on the second?
A. Sort of a warehouse.
Q. What was on the third floor?
A. My friend lived there and rented two rooms.
Q. And one else lived on the third floor?
A. Two roomers, Wong Sang and Ling Sing.
Q. Any Chinese women live on the third floor during the years you lived in San Francisco?
A. No; there were no women there; the rooms were small.
Q. Any Chinese women on the second floor of that building?
A. No Chinese women there.
Q. How often did you visit that store?
A. Once or twice a week.

Cross-examination by Mr. MOORE:

Q. You have been in the United States twenty-seven years?
A. Yes, sir.
Q. What is this man's name that you know?
A. Gong Wing.
Q. What year of Kwong Suey was it that he came to the United States?
A. 1879.
Q. What year of Kwong Suey was it?
A. Fifth year of Kwong Suey.
Q. Who was the man that rented the third floor of that 847 Dupont St.?
A. Wong Hung; he was the proprietor of the store below.
Q. Who rented the third floor?
A. Wong Sang and Ling Sing.
Q. Who rented the second floor?
A. Warehouse, part and parcel of the store.
Q. What store?
A. Wong Hong.
Q. What kind of a building was this, stone, brick or wood?
A. Wood.
Q. Sure about that?
A. Yes, sir.
Q. You came to the United States 27 years ago?
A. Yes, sir.
Q. How long did you live in San Francisco?
A. Eleven years.
Q. Then where did you go?
A. Philadelphia.
Q. How long did you live in Philadelphia?

A. Twelve years.
Q. Then where did you go?
A. New York.
Q. How long in New York?
A. About 4 years.
Q. Who else was in this store, 847 Dupont St.?
A. Wong Hung and his nephew.
Q. What is his name?
A. Wong Lee.
Q. Who else?
A. Ling Sing.
Q. Who else?
A. These three men.
Q. Anybody else?
A. That is all.
Q. You said they rented some rooms there on the third floor, didn't they?
A. They rented two rooms.
Q. Do you know who lived in those rooms?
A. Wong Sand and Ling Sing.
Q. All the 11 years you were in San Francisco?
A. Yes, sir.
Q. Who else lived in the building besides these five people you have spoken of?
A. No one else.
Q. Was that a wooden building all the time you live- in San Francisco?
A. Yes, sir.
Q. And only three stories high?
A. Yes, sir.
Q. Didn't it have a brick front?
A. No brick.
Q. How far is that from Commercial street?
A. A little over two streets.
Q. This Gong Wing that you knew lived on Commercial street?
A. First went there, yes.
Q. Who first went there?
A. Gong Wing.
Q. Do you know how long he lived on Commercial St.?
A. I don't know how many years he lived there, but I saw
21 him coming and going there for a number of years.
Q. During this time did you see any Chinese women living in San Francisco during the time you lived there?
A. Yes, quite a number.
Q. Where does this Gong Wing live now, if you know?
A. New York.
Q. Whereabouts?
A. No. 16 Pell St.
Q. How long has he lived there?
A. I don't know how long he has been there, but I have seen him there for the last two years.

Q. How old is he?
A. About 38 years of age, I think.
Q. Have you ever been a witness in a Chinese case before?
A. No, sir.
Q. Never?
A. Yes, I have been.
Q. Where?
A. I have been to Malone.
Q. When?
A. Over a year ago.
Q. What case did you testify in?
A. I don't remember the title of the case.
Q. Do you remember the name of the witness who testifed for the defendant there?
A. I don't recall it.
Q. Ever testify in any other case?
A. That is the only time.
Q. Haven't you been over to Burlington?
A. No, sir.
Q. Haven't you been to Malone more than once?
A. Only once.
Q. What was what time?
A. A little over a year ago, I can't recollect the exact date.
Q. Can't you tell anything about the case that you were sworn in the case in Malone?
A. I do remember some of it.
Q. What is the case?
22 A. I testified I knew him in China, his name was Ah Kieu.
Q. What name did you go by in Malone?
A. Lee Sing.
Q. Didn't you testify there that you knew this man there, Ah Kieu?
A. I didn't testify about a person called Ah Kieu, I testified about a bridge; I testified about a brother-in-law.
Q. Did you testify about your brother-in-law?
A. Testified about my own brother-in-law.
Q. What is his name?
A. Lee Quon.
Q. Was this Lee Quon a witness for the defendant?
A. His brother-in-law was not a witness.
Q. Was your brother-in-law there, or what did you do?
A. It was a man by the name of Koong Leung who had a son at 830 Dupont St., and I testified he didn't have any.
Q. When was it?
A. I don't remember.
Q. Whereabouts did you live when you were in San Francisco?
A. No. 830 Dupont St.
Q. Whereabouts did this Koong Lung live?
A. No. 830 Dupont St., in the store.

Q. Did you testify in Malone that Koong Lung lived at 808 Dupont St.?
A. I didn't testify.
Q. Did you testify that he lived at 830 Dupont St., and no other place?
A. Yes, sir.
Q. Do you know who lived in all the stores in Chinatown, San Francisco?
A. No; I don't know.
Q. Do you know who lived in any of the stores in Dupont St., except 830 and 847 Dupont St.?
A. I knew some and didn't know others.
23 Q. Do you know who lived at 845 Dupont St.?
A. No, sir; don't remember.
Q. Do you know who lived at 843 Dupont St.?
A. I don't know.
Q. Do you know who lived at 841 Dupont St.?
A. I don't remember.
Q. Do you know who lived at 839 Dupont St.?
A. I don't remember.
Q. Do you know who lived at 837 Dupont St.?
A. I don't remember.
Q. Do you remember who lived at 835 Dupont St.?
A. I don't remember.
Q. Do you remember who lived at 834 Dupont St.?
A. I don't remember.
Q. Do you know who lived at 828 Dupont St.?
A. Don't remember.
Q. Do you know who lived at 832 Dupont St.?
A. Don't remember.
Q. Do you know whether it was an American or Chinese store at 832 Dupont St.?
A. Chinese store, but some white people go in there and go out.
Q. Do you know who lived at 834 Dupont St.?
A. Don't remember.
Q. Do you know who lived at 836 Dupont St.?
A. Don't know.
Q. Do you know who lived at 838 Dupont St.?
A. Don't know.
Q. Do you know who lived at 840 Dupont St.?
A. Don't know.
Q. Do you know who lived at 842 Dupont St.?
A. Don't remember.
Q. Do you know who lived at 846 Dupont St.?
A. Don't know.
Q. Do you remember who lived at 848 Dupont St.?
A. Don't remember.
Q. Do you remember who lived at 849 Dupont St.?
A. Don't remember.
Q. Do you know who lived at 851 Dupont St.?
A. Don't remember.

Q. Do you know what kind of a store was at 851 Dupont St.?
A. No.
24 Q. Do you know what kind of a store was at 839 Dupont St.?
A. Don't remember.
Q. Do you know what kind of a store was at 847 Dupont St.?
A. Chinese grocery.

Government and defendants rest.
Evidence closed.
Case submitted.

25 *Judgment.*

United States Commissioner's Court, Northern District of New York.

UNITED STATES OF AMERICA }
vs.
CHIN BAK KAN. }

Be it remembered that on the 13th day of March, A. D. 1901, complaint was made under oath by George W. Ketcham, on behalf of the United States, before William V. S. Woodward, a commissioner of the U. S. district court, for said district, charging that Chin Bak Kan, on the 13th day of March, A. D. 1901, did unlawfully come into the United States from Canada, he, said Chin Bak Kan, being then and there a Chinese person and laborer and not being a diplomatic or other officer of the Chinese, or any other government, and without producing the certificate required of Chinese person- seeking to enter the United States, and that he was not entitled to be or remain within the United States; and thereupon said commissioner, William V. S. Woodward, issued a warrant for the arrest of said Chin Bak Kan, to F. G. Roby, deputy United States marshal, for said district, who arrested said Chin Bak Kan and brought him before said Woodward on the 15th day of March, A. D. 1901.

26 And the said Chin Bak Kan was thereupon informed of the charge so made against him, and was advised that he would be permitted to make a statement without or with oath, or to refuse to make any statement or to answer any question put to him, and was entitled to a reasonable time to send for and advise with counsel, and to procure the attendance of witnesses.

And the said Chin Bak Kan pleaded not guilty to said charge, but admitted that he had just come into the United States; and was then and thereafter represented by R. M. Moore, Esq., his counsel.

And thereafter, a hearing and trial was commenced before said Commissioner William V. S. Woodward, upon said charge and issue so joined, and testimony duly given before him, which trial said Commissioner William V. S. Woodward was unable to finish on account of illness, and thereafter and on the 24th day of June, 1901, by a stipulation duly made in open court, by and between the attorneys for the United States and the attorneys for the defend-

ant, the defendant then being in court, it was stipulated and agreed that the trial so commenced before Commissioner Woodward should be continued before me, and that evidence taken before him should be considered by me, and my decision rendered thereon, and I, having fully considered said allegations and testimony and having heard R. M. Moore, Esq., for the defendant and Hon. H. E. Owen for the United States.

27 I now hereby find and adjudge, that the said Chin Bak Kan is a Chinese person and laborer, that he is not a diplomatic, or other officer of the Chinese or any other government, and unlawfully entered the United States, as charged in said complaint.

And I further adjudge him, said Chin Bak Kan guilty of not being lawfully entitled to be, or remain in the United States.

I further find and adjudge, that he, said Chin Bak Kan came from the Empire of China but he has not made it appear to me, that he was a subject or a citizen of some other country than China.

And I hereby order and adjudge, said Chin Bak Kan to be immediately removed from the United States to the Empire of China. A certified copy of this judgment shall be the process upon which said removal of said Chin Bak Kan shall be made from the United States to the Empire of China.

And said process shall be executed by Hon. C. D. MacDougall, U. S. marshal for said district.

In testimony whereof, I have hereunto signed my name officially and affixed my seal this 20 day of July, 1901.

[L. S.]

FRED W. DUDLEY,
United States Commissioner, Northern District of New York.

28 UNITED STATES COMMISSIONER'S COURT, *Northern District of New York,* } ss:

I hereby certify that I have compared the foregoing with an original judgment made, and duly entered upon my records, and that I find the same to be a correct transcript therefrom, and of the whole of such original.

In testimony whereof, I have hereunto signed my name officially this 20 day of July, 1901.

FRED W. DUDLEY,
United States Commissioner, Northern District of New York.

Indorsed: Judgment.

29 *Complaint.*

UNITED STATES OF AMERICA, *Northern District of New York,* } ss.

Before me, William V. S. Woodward, a United States commissioner in and for said district, personally came G. W. Ketcham, of Malone, N. Y., who being duly sworn, on his oath says that he is informed

and verily believes that Chin Bak Kan, of China, at Burke, in said district, on or about the 13 day of March, A. D. 1901, did then and there knowingly, wrongfully, and unlawfully come from Canada, in the province of Quebec, into the northern district of New York, to wit: into Burke, in the county of Franklin, State of New York, in the United States, he the said Chin Bak Kan being then and there a Chinese person and laborer, and a person prohibited by the laws of the United States of America from being and remaining in the United States, and he, the said Chin Bak Kan, then and there being such Chinese person, as aforesaid, was then and there found unlawfully in the United States, at Burke, aforesaid, contrary to the form of the statute of the United States of America in such case made and provided, and against the peace of the United States of America and their dignity.

G. W. KETCHAM.

Sworn and subscribed before me the 13 day of March, 1901.

WM. V. S. WOODWARD,
U. S. Commissioner, Northern District of New York, Plattsburgh, New York.

Indorsed: Complaint.

30 *Warrant to Apprehend.*

To the marshal of the United States for the northern district of New York, and to his deputies, and to any and either of them:

Whereas, complaint has this day been made by G. W. Ketcham on oath, before me, William V. S. Woodward, a commissioner of the United States for the northern district of New York, charging that Chin Bak Kan did, on or about the 13 day of March, 1901, at Burke in said district, knowingly and wrongfully come from Canada, in the province of Quebec, into the northern district of New York, to wit: into Burke in the county of Franklin and State of New York, in the United States, he the said Chin Bak Kan being then and there a Chinese person and laborer, and a person prohibited by the laws of the United States of America from being and remaining in the United States, and he the said Chin Bak Kan then and there being such Chinese person as aforesaid, was then and there found unlawfully in the United States at Burke aforesaid, in violation of the acts of Congress in such case made and provided.

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said Chin Bak Kan and bring his body forthwith before me, one of the commissioners appointed by the district court of the United
31 States for the northern district of New York, at my office in Plattsburgh, N. Y., that he may then and there be dealt with according to law for the said offence.

Given under my hand and seal this 13 day of March, in the year

of our Lord one thousand nine hundred and one and of our
[L. S.] Independence the one hundred and twenty-fifth.

WM. V. S. WOODWARD,
Commissioner of the United States for the Northern District of New York, Plattsburgh, N. Y.

I certify, that on the 13 day of M'ch, 1901, the within-named defendant was arrested at Burke, N. Y., and on the 15 day of M'ch, 1901, conveyed before the within-named commissioner at his office in Plattsburgh, N. Y.

C. D. MACDOUGALL,
United States Marshal.
F. G. ROBY, *Deputy.*

Indorsed: Warrant to apprehend. Rec'd U. S. marshal's office, Syracuse, N. Y. Mar. 18, 1901.

Indorsement on cover: U. S. commissioner's court, northern dist. of New York. Miss. 26. United States ag'st. Chin Bak Kan. commissioner's return. Filed Sep. 9, 1901, W. S. Doolittle, clerk.

32 *Order Dismissing Appeal from Decision of U. S. Commissioner.*

At a special term of the United States district court, for the northern district of New York, held at the Federal building, in the city of Utica, on the 11th day of September, 1901.

Present: Hon. Alfred C. Coxe, U. S. district judge, presiding.

THE UNITED STATES OF AMERICA
vs.
CHIN BACK KAN.

The appeal in the above-entitled action having been brought on for hearing, at a special term of the United States district court, held at the Federal building, in the city of Utica, in and for the northern district of New York, and after hearing John B. Riley, Esq., attorney for the defendant, and George B. Curtiss, United States district attorney, for the United States of America, and after due consideration, it is hereby

Ordered: that the appeal in the above-entitled action be dismissed and that the judgment of deportation of the defendant Chin Bak Kan heretofore made, be, and the same hereby is, affirmed.

A. C. C.

Indorsed: Order. Filed Sep. 11, 1901, W. S. Doolittle, clerk.

33 *Bail Bond.*

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

Be it remembered that on the 15 day of October, 1901, before me John A. Shields, one of the United States commissioners for the

southern district of New York, duly authorized to take acknowledgements of bail, affidavits and depositions, personally came Chin Bak Kan principal, and Morris Isaacs, surety, and severally acknowledged themselves to owe to the United States of America, each the sum of $500, separately to be levied and made of their respective goods, chattels, lands and tenements, to the use of the United States, if default shall be made in the condition following, to wit:

Whereas, the said Chin Bak Kan is now detained in the custody of the United States marshal for the northern district of New York, under commitment and warrant of deportation issued under the Chinese exclusion acts, which order and warrant were affirmed on appeal to the United States district court for the northern district of New York; and

Whereas, said Chin Bak Kan has taken an appeal to the United States Supreme Court from said order and warrant of said district court, and

Whereas, the Hon. R. W. Peckham, associate justice of said United States Supreme Court in and under said appeal did
34 order that said Chin Bak Kan give a bond in the sum of $500, with sufficient surety for his appearance, to answer the exigency and determination of said appeal, and to personally abide the final decision and determination thereof, in default of which said Chin Bak Kan remain in custody, and did further authorize any United States commissioner or commissioners in the second circuit to take such recognizance, and approve the same;

Now, therefore, the condition of said recognizance is such that if the said Chin Bak Kan shall duly personally appear in said United States district court for the northern district of New York, to answer the exigency and determination of said appeal, and personally abide the final decision and determination of said United States Supreme Court, and of the said district court upon the mandate of said United States Supreme Court, upon the condition aforesaid, and upon the entering of said order upon said appeal, and obey and abide the order of said district court, then this recognizance to be void; otherwise to be and remain in full force and virtue.

Signature.

Chinese characters. [SEAL.]
M. ISAACS. [SEAL.]

Taken and acknowledged before me the day and year first above written as to Morris Isaacs surety.

[L. S.]

JOHN A. SHIELDS,
U. S. Commissioner, Southern District of New York.

Taken and acknowledged before me this 18th day of October, 1901, as to Chin Bak Kan principal.

[L. S.]

A. J. NORTHRUP,
U. S. Commissioner.

35 SOUTHERN DISTRICT OF NEW YORK, ss:

Morris Isaacs, being duly sworn, deposes and says: That he resides at No. 213 East 87 street in the *in the* city of New York, county and State of New York; that he is worth upwards of $25,000 over and above all his liabilities actual and contingent; that he is the owner in fee-simple of premises No. 213 East 87th street in the city and county of New York, which are worth the sum of $14,000 and *is* subject to mortgages aggregating $8,000, but to no other incumbrance whatever; that he is also the owner in fee-simple of premises No. 6 Mott street in the city and county of New York, worth the sum of $25,000, and which are subject to mortgages aggregating $14,500, but to no other incumbrance whatsoever; that he makes these statements in order to secure his acceptance as bail herein.

M. ISAACS.

Sworn to before me this 15th day of October, 1901.

JOHN A. SHIELDS,

[L. S.] *U. S. Commissioner, S. D. of N. Y.*

I, John A. Shields, U. S. commissioner for the southern district of New York, do hereby by virtue of the order of Hon. Rufus W. Peckham made herein October 1st, 1901, approve of the form of the foregoing bond, and also of the sufficiency of the surety thereto.

Dated New York, October 15, 1901.

JOHN A. SHIELDS,

[L. S.] *U. S. Commissioner, Southern District of New York.*

Indorsed: Bail bond. Filed Oct. 19, 1901, W. S. Doolittle, clerk.

36 *Petition for and Allowance of Appeal, with Stay and Proof of Service.*

United States Supreme Court.

UNITED STATES, Appellee,
vs.
CHIN BAK KAN, Appellant.

To the justices of the Supreme Court of the United States:

Chin Bak Kan, the appellant defendant herein, hereby applies for the allowance of an appeal to the Supreme Court of the United States, from the judgment, order and decision of the United States district court for the northern district of New York, entered herein on the 12th day of September, 1901.

LEWINSON, KOHLER & SCHATTMAN,
Attorneys for Appellants.

The foregoing application is granted and appeal allowed, and it is further ordered that this appeal shall operate as a supersedeas,

and the execution of the warrant of deportation is stayed pending the appeal.

Dated Albany, Oct. 1, 1901.

R. W. PECKHAM,
Associate Justice U. S. Supreme Court.

37 United States Supreme Court.

UNITED STATES, Appellee,
vs.
CHIN BAK KAN, Appellant.

Due service of the petition for and allowance of appeal, with stay of execution of warrant of deportation pending appeal, and order authorizing bail endorsed thereon, bond for damages and costs, with approval endorsed thereon, assignment of errors and citation in the above-entitled action is hereby admitted.

Dated New York, October 7, 1901.

GEO. B. CURTISS,
U. S. Attorney for the Northern District of New York.

Indorsed: Petition for and allowance of appeal with stay & proof of service. Appellant is authorized after service of the citation herein to give bail pending the appeal in the sum of $500 with sufficient surety, and any U. S. commissioner or commissioners within the second circuit is authorized to take and approve such bail bond. Oct. 1, 1901. R. W. Peckham, assoc. justice U. S. Sup. Court. Filed Oct. 22, 1901, W. S. Doolittle, clerk.

38 *Bond for Damages and Costs.*

United States Supreme Court.

UNITED STATES, Appellee,
vs.
CHIN BAK KAN, Appellant.

Know all men by these presents that we, Chin Bak Kan, as principal, and Chin Shung Pon surety, are held and firmly bound, jointly and severally, unto the above-named United States in the sum of two hundred and fifty dollars, to be paid to the United States, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, dated the 30 day of September, 1901.

Whereas, the above-named Chin Bak Kan has prosecuted an appeal to the United States Supreme Court to reverse the order made and rendered in the above-entitled proceeding by the judge of the district court of the United States for the northern district of New York;

Now, therefore, the condition of this obligation is such that if the

above-named Chin Bak Kan shall prosecute said appeal to
39 effect and answer all damages and costs, if *they* shall fail to make the said appeal good then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

CHIN SHUNG PON. [SEAL.]

STATE OF NEW YORK, } ss:
County of New York, }

Chin Shung Pon, being duly sworn, says that he is the surety named in and who executed the foregoing bond or undertaking; that he is a resident and householder within the State of New York, residing at 12½ Pell street in the city of New York, and is worth upwards of the sum of $1,000 — dollars over and above all his debts and liabilities, and exclusive of property exempt by law from levy and sale under execution.

CHIN SHUNG PON.

Sworn to before me this 30 day of September, 1901.

LEON HUHNER,
Notary Public, N. Y. Co.

[L. S.]

COUNTY OF NEW YORK, ss:

On this 30 day of September, 1901, before me personally came and appeared Chin Shung Pon to me known and known to me to be one of the individuals mentioned and described in and who
40 executed the foregoing instrument and he duly acknowledged to me that he executed the same.

LEON HUHNER,
Notary Public, N. Y. Co.

[L. S.]

Indorsed: Bond for damages and costs. Approved October 1st, 1901. R. W. Peckham, associate justice, U. S. Supreme Court. Filed Oct. 22, 1901, W. S. Doolittle, clerk.

41 *Assignment of Errors.*

United States Supreme Court.

UNITED STATES, Appellee, }
vs.
CHIN BAK KAN, Appellant. }

The above-named appellant on this appeal from the order of the district court of the United States for the northern district of New York, affirming the order of deportation of U. S. Commissioner Dudley, for his assignment of errors herein, alleges and complains that the order appealed from and the proceedings in said court and before said commissioner are illegal, irregular and erroneous for each and all of the following reasons:

First. In not holding that appellant is a citizen of the United States by birth, and not subject to the provisions of the Chinese

exclusion acts, and that the commissioner and judge ordering appellant's deportation had no jurisdiction over his person.

Second. In not holding that said commissioner and court had no jurisdiction over appellant, because appellant was proceeded against by complaint which was not under such oath as is required by law, and the same was insufficient to confer jurisdiction.

42 Third. In not holding that appellant is held in custody in violation of his constitutional rights as a citizen of the United States, he having been required by affirmative proof to prove to the satisfaction of such commissioner and court his right to be and remain in the United States in accordance with section 3 of the act of May 5th, 1892, and in ordering his deportation for failure so to do, whereas said provision of law is unconstitutional as applied to appellant who is and claimed to be a citizen of the United States by birth, of Chinese extraction.

Fourth. In not holding that section 3 of the act of May 5th, 1892, is inoperative and stands repealed by the treaty of the United States with China, promulgated in 1894, and that a correct and proper construction of said treaty required a holding that said provision stands repealed and of no effect.

Fifth. In not holding that said commissioner and said court had no jurisdiction over appellant under said Chinese exclusion acts, or other provision of law, in that the treaty of the United States with China, promulgated in 1894, does not authorize any proceedings against Chinese persons found within the United States, charged with unlawful entry into the United States, before any United States judge, court or commissioner, and said treaty of the United States with China repealed the provisions of law theretofore in force conferring jurisdiction over proceedings for the deportation of persons of Chinese extraction found in the United States.

43 Sixth. In not ordering appellant's discharge from custody.

Seventh. In not holding upon the evidence that appellant's American citizenship was established.

Eighth. For error in admitting evidence, over defendant's exceptions, in the course of the examination of the witness, Gong Wing, the uncle of appellant, relative to said witness' certificate of registration, and the application therefor appearing in the record as follows:

Q. Have you got a labor certificate?
A. Yes, sir.

Q. Witness requested to produce his labor certificate.
A. Certificate produced.
(Certificate shown witness.)

Q. Is that your certificate?
A. Yes, sir.

Mr. Dwyer offers certificate in evidence for identification of the witness.

The defendant's counsel objects upon the ground that it is incom-

petent, immaterial and the defendant is under no obligation to produce it; that it is not binding upon the defendant, but only for the protection of the witness.

Objection overruled.

Certificate received in evidence.

Marked Plaintiff's Exhibit A.

Labor certificate No. 28108, issued to Gong Wing, on the 12th day of February, 1894, at New York, by Ferdinand Eidman, collector of internal revenue, third district of New York.

LEWINSON, KOHLER & SCHATTMAN,
Attorneys for Appellant.

Indorsed: Assignment of errors. Filed Oct. 22, 1901, W. S. Doolittle, clerk.

44 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the United States of America and the United States marshal for the northern district of New York:

You are hereby cited and admonished to be and appear before the United States Supreme Court, at Washington, in the District of Columbia, on the 29th day of October, 1901, pursuant to an appeal on the part of the petitioner herein, Chin Bak Kan, filed in the clerk's office of the said court in a certain suit or proceeding entitled: United States *vs.* Chin Bak Kan, to show cause, if any there be, why the decision of the United States district court for the northern district of New York, in the said appeal mentioned, should not be reversed, modified or corrected, and speedy justice should not be done in that behalf.

Given under my hand at the city of Albany in the second circuit, this 1 day of October, 1901.

R. W. PECKHAM,
Associate Justice U. S. Supreme Court.

45 [Endorsed:] Misc. 26. U. S. Supreme Court. United States *vs.* Chin Bak Kan. Citation (Original) Lewinson, Kohler & Schattman attorneys for appellant 119 Nassau St. (Temple court), borough of Manhattan, New York city, N. Y. U. S. district court, N. D. of N. Y. Filed Oct. 22 1901 at — o'clock — m. W. S. Doolittle, clerk. D.

46 UNITED STATES OF AMERICA, }
Northern District of New York, } *ss:*

I, William S. Doolittle, clerk of the district court of the United States of America, for the northern district of New York, in the second circuit, do hereby certify, that the foregoing pages, numbered from 1 to 45 inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of United

States *vs.* Chin Bak Kan as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of Utica, in the northern district of New York, in the second circuit, this thirty-first day of October, in the year of our Lord, one thousand nine hundred and one and of the Independence of the said United States, the one hundred and twenty-sixth.

Seal United States District Court, N. Dist. of New York.

W. S. DOOLITTLE, *Clerk.*

Endorsed on cover: File No. 18,378. N. New York D. C. U. S. Term No. 525. Chin Bak Kan, appellant, *vs.* The United States. Filed January 21, 1902.

(18,379.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 526.

CHIN YING, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 22, 1902.

1 *Petition for Appeal from Decision of United States Commissioner.*

United States District Court, Northern District of New York.

UNITED STATES OF AMERICA
against
CHIN YING, Defendant.

The above-named defendant feeling aggrieved by the order made and entered on the 20th day of July, 1901, in the above-entitled action by Hon. Fred W. Dudley, United States commissioner, in and for the said district, by which it was adjudged that said defendant was a Chinese person found unlawfully in the United States, and that he should be deported to the Empire of China, he does hereby appeal from the said order to the judge of the said United States district court, in and for the northern district of New York, for the reasons specified in the assignment of errors, which is filed herewith; and he prays that this appeal may be allowed and that a transcript of the record, proceedings, and papers upon which the said order was made, duly authenticated, may be sent to the said judge.

Dated July 27th, 1901.

Yours, etc.,

JOHN B. RILEY,
Attorney for Defendants.

Office & post-office address: Plattsburgh, N. Y.

The foregoing appeal is allowed.

A. C. COXE.

2 *Affidavit on Appeal from Decision of United States Commissioner.*

United States District Court, Northern District of New York.

UNITED STATES OF AMERICA, Plaintiff,
against
CHIN YING, Defendant.

UNITED STATES OF AMERICA,
Northern District of New York, } *ss:*

John B. Riley, being duly sworn, says: That he is the attorney for the defendant in the above-entitled cause, and, upon information and belief, alleges that the order made by the commissioner herein is erroneous and against the just rights of the said defendant, for the following reasons:

First. The commissioner erred in refusing to discharge the defendant upon the evidence produced upon the trial of this cause.

Second. That the commissioner on such trial rejected proper evidence showing the right of the defendant to be and remain in the United States, and admitted immaterial, improper and incompetent testimony.

Third. For other errors appearing in the record of said trial.

JOHN B. RILEY.

Subscribed and sworn to before me this 27th day of July, 1901.
D. J. CLEARY,
Notary Public.

3 *Order Allowing Appeal from Decision of United States Commissioner.*

United States District Court, Northern District of New York.

UNITED STATES OF AMERICA, Plaintiff,
against
CHIN YING, Defendant.

On this 31st day of July, 1901, it is ordered, that the appeal be allowed as prayed for.

And it is further ordered that a copy of the petition for appeal, assignment of error on appeal and order allowing the appeal be served upon the United States attorney and that service be made forthwith by mail, and that a copy of the said papers be served upon the said United States commissioner, Hon. Fred W. Dudley, and Warren Dow, deputy United States marshal.

And it is further ordered that the plaintiff, through its attorney, Hon. George B. Curtiss, be and appear at a session of the United States district court, in and for the northern district of New York, appointed to be held at the city of Utica on the 10th day of Sept., 1901, pursuant to a notice of appeal and allowance thereof filed in the clerk's office of the northern district of New York, wherein The United States of America is plaintiff and Chin Ying is defend-
ant, to show cause, if any, why the judgment and order
4 rendered against the said defendant, as in the said notice of appeal mentioned, should not be set aside and justice done to the parties in that behalf.

And it is further ordered that the said commissioner, Hon. Fred W. Dudley, make return to this court of all papers and proceedings had before him, set forth in the notice of appeal herein.

And it is further ordered that all proceedings be stayed pending this appeal.

A. C. COXE, *U. S. J.*

Indorsed: Petition, affidavit & order. Filed Aug. 3, 1901. W. S. Doolittle, clerk.

5 United States Commissioner's Court, Northern District of New York.

UNITED STATES OF AMERICA
vs.
CHIN YING.

To the district court of the United States for the northern district of New York:

Pursuant to the annexed writ, I, the undersigned, do respectfully return to the said court that the following are all the proceedings

taken in the above-entitled action, including all the evidence given therein, and the judgment rendered therein, & the exhibits offered & received in evidence.

Dated this 6th day of September, 1901.

FRED W. DUDLEY,
United States Commissioner, Northern Dist. of New York.

6 38 lot. No. 71.

United States Commissioner's Court, Northern District of New York.

UNITED STATES OF AMERICA
against
CHING YING.

Hearing had in the above-entitled action before William V. S. Woodward, Esq., United States commissioner, at the court-house, in Plattsburgh, New York, on the 30th day of April, 1901.

Appearances.

Hon. H. E. Owen, assistant United States attorney, appears for the United States.

R. M. Moore, Esq., and Hon. John B. Riley appear for the defendant.

Defendant in court in charge of Marshall Dow.

Moy Foon sworn as interpreter.

The counsel for the defendant admit that the defendant in a Chinese person and not a member of the exempt class, and that he came into the United States from the Dominion of Canada as charged in the complaint and warrant in this action.

7 LEE HONG, sworn as a witness in behalf of the defendant, testified as follows:

Direct examination by Mr. RILEY:

Q. How old are you?
A. 48.
Q. How many years since you first came to the United States?
A. 31 years.
Q. Where did you land?
A. San Francisco.
Q. How long did you stay there?
A. 10 years.
Q. Where, what street and number?
A. 721 Commercial St.
Q. Where did you go?
A. To New York, 18 Mott street.
Q. How long there?
A. 10 years.
Q. Then where?

A. Went back to China.
Q. How long in China?
A. One year.
Q. Then where?
A. Returned to New York.
Q. Where?
A. 18 Mott street.
Q. How long at 18 Mott street?
A. 10 years.
Q. Are you living there now?
A. Yes, sir.
Q. Have you ever lived at 163 Varick street?
A. Yes, sir.
Q. How long did you live at 163 Varick street?
A. 3 years.
Q. Were you living there at the time you took out this certificate?
A. Yes, sir.
Q. What is your business?
A. Laundryman.
Q. Do you know the defendant?
A. Yes, sir.
Q. Is he related to you?
A. My sister's son.
Q. Where was he born?
A. Born in San Francisco.
Q. What street and number?
A. 721 Commercial street.
Q. Were you living there at that time in the same house?
A. Yes, sir.
8 Q. Did you see the defendant when you were in China the last time?
A. Yes, sir.
Q. How old is he?
A. 31.

Cross-examination by Mr. OWEN:

Q. Is that a photograph of the defendant?
A. Yes, sir.

Paper marked Exhibit A, for identification.

Q. How old was this defendant when he went back to China the first time?
A. 10 years old.
Q. Has he been in the United States since then—since he came the first time?
A. Yes, sir.
Q. How long ago did you first learn that he was in Plattsburgh?
A. The father wrote me that he was coming.
Q. Do you know whether or not he was at a laundry at 2095 Third avenue?

A. No, sir; I do not know.

Q. Do you know whether or not the defendant lived at 2095 Third avenue for five years?

A. No, sir.

Q. He might have had a laundry at 2095 Third avenue and you not know it?

A. Yes, sir.

Q. Do you know that this defendant is your brother?

A. My sister's son.

Q. You don't know whether he has been to the United States since he first went back to China or not, do you?

A. Ten years old when he went back to China.

Q. Has he been in the United States since that time until now?

A. Until now.

Q. Where was this defendant born?

A. San Francisco.

Q. What street and number?

A. 721 Commercial street, San Francisco.

Q. How many floors or stories to that building?

A. Four.

9 Q. What floor did your sister and her family live on?

A. Top floor.

Q. Who else lived there with her?

A. Only my sister and her husband and my nephew lived there.

Q. Any other Chinese families?

A. No, sir.

Q. After you lived in San Francisco where did you go?

A. Came to New York.

Q. How long did you live in New York?

A. 10 years.

Q. Where did you go then?

A. Went back to China.

Q. How long did you live in China?

A. One year.

Q. Then where did you go?

A. Came to New York.

Q. How long have you been in New York?

A. 10 years.

Q. Was the defendant in China when you were there?

A. Yes.

Q. Has this defendant ever worked in New York or lived in New York?

A. No, sir.

Q. Has he ever been in the United States before?

A. He was ten years old and went back to China and just came until now.

Q. Are you sure about that?

A. Yes, sir.

Q. Do you know whether or not he has ever lived at 26 Mott street?

A. No, sir.
Q. You don't know whether or not he has lived there?
A. Don't know.
Q. Do you know whether or not he has been a member of the firm Wah Yuen?
A. I don't know.
Q. Do you know where he was in '97?
A. No, sir.
Q. Do you know where he was in 1898?
A. No, sir.
Q. Do you know where he was in 1896?
A. No, sir.
Q. Or 1895?
A. No, sir.
Q. Have you ever been a witness in a Chinese case before?
A. No, sir.
Q. Is that your labor certificate there?
A. Yes, sir.

Certificate offered in evidence for the purpose of identification of witness.

Certificate received and marked Exhibit B.

Labor certificate, No. 121,739, issued to Lee Hong on the 7th day of April, 1894, at New York, by M. Kerwin, collector of internal revenue, second district of New York.

Mr. Owen asks for an adjournment.

Case adjourned to the 14th day of May, 1901.

United States Commissioner's Court, Northern District of New York.

UNITED STATES OF AMERICA
against
CHUNG YING.

Adjourned hearing had in the above-entitled action before Hon. Fred W. Dudley, United States commissioner, at the grand jury room, in the court-house, in the village of Plattsburgh, New York, on the 10th day of July, 1901.

Appearances.

H. E. Owen, Esq., assistant United States attorney, appears for United States.

Robert M. Moore, Esq., and Hon. John B. Riley, appear for the defendant.

By consent the papers marked Exhibit A by United States Commissioner Dudley shall be received in evidence without objection by either side, with the same force & effect as if the witness were personally present & sworn.

12 Copy.

NEW YORK, *January* 31*st*, 1900.

Hon. Secretary of the Treasury, Washington, D. C.

SIR: On behalf of Sum Jim, merchant and member of the firm of Wo Yuen & Co., importers and dealers in Chinese groceries doing business at # 35 Pell street, New York city, I hereby appeal to you from the decision of the collector of customs at San Francisco in refusing him permission to re-enter this country and I also protest against the mode of procedure in his being deported previous to the return of the report as to his status as a merchant from the collector at New York.

I submit herewith for your approval the affidavits of Edward Cole, Louis Voight, George S. Miller and Herman Brown all credible witnesses who had frequent business *business* dealings with the firm of Wo Yuen & Co.—selling them goods, etc., also the affidavits of four Chinese houses of excellent standing in this city.

The reason of the rejection was I believe based upon the testimony of the housekeeper; together with her son and daughter, of the building at # 2079 3rd avenue, this city, who identified the photograph of Sum Jim to be that of the proprietor of a Chinese laundry formerly situate at the above address but closed since December, 1898. I called upon this woman, who refused to give her name, and asked her to make affidavit as to the correctness of the identification which she refused to do, and stated that she could not swear as to the correctness of same as she had only seen the man but once or twice, the son
13 and daughter age thirteen and eleven, respectively, were too young to *to* understand the nature of an oath. The woman further stated that the Chinaman whom she knew as the owner of the laundry spoke English very well and dressed quite stylish. As to the correctness of this I will state, under oath, that I knew Sum Jim for quite some time previous to his departure from the U. S. and always saw him in and about the store of Wo Yuen & Co. and that he spoke but very few words of English and that I never, to the best of my knowledge, saw him dressed in anything but a Chinese coat and American trousers and the other witnesses will bear me out in this statement. I also showed the photograph which is attached to affidavit submitted herewith to several store-keepers in the neighborhood asking them if they could identify same, but they stated they could not separate (one) Chinaman from another, which is what every one not in constant contact with them will state. I *I* would further state that the house of Wo Yuen & Co. has been for a number of years in business and for the past two years done considerable importing and are considered a reliable house by all with whom they do business.

I would ask that in event of your deciding to admit this man that the collector of customs at San Francisco be ordered to hold the papers for a sufficient time in order to enable Sum Jim to return from China where he now is awaiting the result of this appeal.

Respectfully submitted, JAMES V. STOREY.

14 I, James V. Storey, do solemnly and truly swear that all of the above statements, are, to the best of my knowledge and belief, true in every particular.

JAMES V. STOREY.

Sworn to before me this 31st day of January, 1900.
[SEAL.] JOHN J. ROONEY,
Notary Public.

Indorsed: No. 1111 S. A. Chinese. No. 2947 Chinese.

15 Inspector's report. On board the "Doric," November 14, 1899. No. 188. Sum Jum. J. Lynch, inspector. Class, merchant, New York. C. Rickards, interpreter. Ex. S.S. "Doric," November 6, 1899. B. T. S., stenographer.

Q. What is your name?
A. Sum Jum.
Q. What is your occupation?
A. Merchant, New York, Wah Yuen & Co.
Q. How many partners in that firm?
A. 5.
Q. How much capital invested?
A. $5,000.
Q. What is your share?
A. $1,000.
Q. What is your particular duty in the store?
A. Salesman.
Q. How long have you been connected with that firm?
A. 7 or 8 years.
Q. Up to the time you went to China?
A. Yes.
Q. During that time did you engage in any other employment?
A. No.
Q. Have you been a laundryman or cook in New York?
A. No.
Q. Is your firm interested in a laundry in New York?
A. No.
Q. Is your store located in a brick building in New York?
A. Yes; brick building, 26 Mott St.
Q. How many stories high is that building?
A. Three stories; just before I went to China they moved to 35 Pell St.
Q. Is your store on Pell St. a brick building?
A. Yes.
Q. How many stories is that building?
A. When I went to China the building was not completed, so do not know how many stories.
Q. Give me the names of the white men who signed your paper?
A. Mr. H. Cole, pork business, 21 Spring St., I have known him 7 or 8 years.

Q. Has he been in your store?
A. Yes.
Q. Give another name?
A. Mr. H. Brown, liquor business, I have known him 7 or 8 years.
Q. Has he been in your store?
A. Yes; he goes in my store to deliver goods.

Visé—"Belgic," May 29, 1897. No. 7.

16 PL'FF'S EX. "A," W. V. S. W. Apr. 30. '01.

U. S.
vs.
CHIN YING.

Whereas, Sum Jim, whose photograph is hereto attached is about to depart for China upon a temporary visit, with the intention of returning to the United States and of retaining his commercial domicile in the United States during such temporary absence.

[Written across the face:] Departed from San Francisco per steamer Belgic May 29, 1897. John Lynch, inspector, 7.

(Photograph.)

Now therefore, for the better identification of the said Sum Jim, and in order to facilitate his landing upon his said return—

We the undersigned do hereby certify that the said Sum Jim is a domiciled resident of the city of New York, and that he has been such for at least one year last past; that he is a merchant in good standing and a member of the firm of Wo Yuen & Co., engaged in buying and selling Chinese groceries and merchandise at a fixed place of business to wit: No. 26 Mott street, New York city, N. Y., which business is conducted in his name, meaning and intending thereby that he is known and reputed to be a member of said firm, and that he and his partners carry on their business under the commercial name of Wo Yuen & Co., which firm name is a fanciful designation, and does not contain the name of any of the partners of said firm.

That he conducted such business for more than one year prior to the date of this certificate, and that during such time he was not engaged in the performance of any manual labor except such
17 as was necessary in the conduct of his business as such merchant.

Dated: May 15, 1897.

Signature.	Occupation.
Edward Cole, 21 Spring St., N. Y. city	Provision dealer
Herman Brown, 25 Bowery	Liquor dealer.

Sworn to before me this 15 day of May, 1897.

RICHARD MEISTER,
Notary Public, N. Y. Co., 44.

[L. S.]

18 NEW YORK, N. Y., U. S. A., *May* 19, 1897.

I have seen both of the witnesses in this case, and they say that the statement is all right with this qualification which appears to be correct, viz: that the firm of Wo Yuen of which Sum Jim is a member has only been at No. 26 Mott street, a few months; it having been previous to that time at No. 36 Mott street, but the building having been torn down a short while back it removed to its present location, where I found Sum Jim at work apparently as a member of the firm.

In all other respects the witnesses say the statement is correct.

L. W. WISE.

Indorsed: Original certificate of identification of Sum Jim, of Wo Yuen & Co., 26 Mott St., New York city, N. Y., departing for China, via San Francisco, Cal. Certif., 188; serial, 2271. Name, Sum Jim; class, merchant; place, New York. Wo Yuen & Co. Ex. S. S. Doric. Nov. 6, 1899. Registration —. Partnership, 2947 Chinese. Landed —. Denied Dec. 28, 1899. J. P. Jackson, collector. Received New York, Nov. 20, 1899. No. 1–S. Custom-house. Ex. "A." F. W. D., U. S. C.

19 *Complaint.*

UNITED STATES OF AMERICA, *Northern District of New York,* } ss.

Before me, William V. S. Woodward, a United States commissioner in and for said district, personally came G. W. Ketcham, of Malone, N. Y., who being duly sworn, on his oath says that he is informed and verily believes that Chin Ying of China, at Burke in said district, on or about the 13th day of March A. D., 1901, did then and there knowingly, wrongfully, and unlawfully come from Canada, in the province of Quebec, into the northern district of New York, to wit: into Burke in the county of Franklin State of New York, in the United States, he the said Ching Ying being then and there a Chinese person and laborer, and a person prohibited by the laws of the United States of America from being and remaining in the United States, and he, the said Chin Ying, then and there being such Chinese person as aforesaid, was then and there found unlawfully in the United States, at Burke aforesaid, contrary to the form of the statute of the United States of America in such case made and provided, and against the peace of the United States of America and their dignity.

G. W. KETCHAM.

Sworn and subscribed before me the 13th day of March, 1901.

WM. V. S. WOODWARD,
U. S. Commissioner, Northern District of New York, Plattsburgh, N. Y.

Indorsed: Complaint.

20 *Warrant to Apprehend.*

To the marshal of the United States for the northern district of New York, and to his deputies, and to any and either of them:

Whereas, complaint has this day been made by G. W. Ketcham on oath, before me, William V. S. Woodward, a commissioner of the United States for the northern district of New York, charging that Chin Ying did, on or about the 13 day of March, 1901, at Burke in said district, knowingly and wrongfully come from Canada, in the province of Quebec, into the northern district of New York, to wit: into Burke in the county of Franklin and State of New York, in the United States, he the said Chin Ying being then and there a Chinese person and laborer, and a person prohibited by the laws of the United States of America from being and remaining in the United States, and he the said Chin Ying then and there being such Chinese person as aforesaid, was then and there found unlawfully in the United States at Burke aforesaid, in violation of the acts of Congress in such case made and provided.

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said Chin Ying and bring his body forthwith before me, one of the commissioners appointed by the district court of the United
21 States for the northern district of New York, at my office in Plattsburgh, N. Y., that he may then and there be dealt with according to law for the said offence.

Given under my hand and seal this 13 day of March, in the year of our Lord one thousand nine hundred and one and of our
[L. S.] Independence the one hundred and twenty-fifth.

WM. V. S. WOODWARD,
Commissioner of the United States for the Northern District of New York, Plattsburgh, N. Y.

I certify, that on the 13 day of M'ch, 1901, the within-named defendant was arrested at Burke, N. Y., and on the 15 day of M'ch, 1901, conveyed before the within-named commissioner at his office in Plattsburgh, N. Y.

C. D. MacDOUGALL,
United States Marshal.
F. G. ROBY, *Deputy.*

Indorsed: Warrant to apprehend. Rec'd U. S. marshal's office, Syracuse, N. Y. Mar. 18, 1901.

22 *Judgment.*

United States Commissioner's Court, Northern District of New York.

UNITED STATES OF AMERICA }
vs.
CHING YING. }

Be it remembered, that on the 13th day of March, A. D., 1901, complaint was made under oath by George W. Ketcham, on behalf of the United States, before William V. S. Woodward, a commissioner of the U. S. district court, for said district, charging that Chin Ying, on the 13th day of March, A. D., 1901, did unlawfully come into the United States from Canada, he, said Chin Ying being then and there a Chinese person and laborer and not being a diplomatic or other officer of the Chinese, or any other government, and without producing the certificate required of Chinese person- seeking to enter the United States, and that he was not entitled to be or remain within the United States; and thereupon said commissioner William V. S. Woodward, issued a warrant for the arrest of said Chin Ying to F. G. Roby, deputy United States marshal, for said district, who arrested said Chin Ying and brought him before said Woodward on the 15th day of March, A. D. 1901.

23 And the said Chin Ying was thereupon informed of the charge so made against him, and was advised that he would be permitted to make a statement without or with oath, or to refuse to make any statement or to answer any question put to him, and was entitled to a reasonable time to send for and advise with counsel, and to procure the attendance of witnesses.

And the said Chin Ying pleaded not guilty to said charge, but admitted that he had just come into the United States; and was then and thereafter represented by R. M. Moore, Esq., his counsel.

And thereafter, a hearing and trial was commenced before said Commissioner William V. S. Woodward, upon said charge and issue so joined, and testimony duly given before him, which trial said Commissioner William V. S. Woodward was unable to finish on account of illness, and thereafter and on the 24 day of June, 1901, by a stipulation duly made in open court, by and between the attorneys for the United States and the attorneys for the defendant, the defendant then being in court, it was stipulated and agreed that the trial so commenced before Commissioner Woodward should be continued before me, and that evidence taken before him should be considered by me, and my decision rendered thereon, and I, having fully considered said allegations and testimony and having heard R. M. Moore, Esq., for the defendant and Hon. H. E. Owen for the United States.

24 I now hereby find and adjudge, that the said Chin Ying is a Chinese person and laborer, that he is not a diplomatic, or other officer of the Chinese or any other government, and unlawfully entered the United States, as charged in said complaint.

And I further adjudge him, said Chin Ying guilty of not being lawfully entitled to be, or remain in the United States.

I further find and adjudge, that he, said Chin Ying came from the Empire of China but he has not made it appear to me, that he was a subject or a citizen of some other country than China.

And I hereby order and adjudge, said Chin Ying to be immediately removed from the United States to the Empire of China. A certified copy of this judgment shall be the process upon which said removal of said Chin Ying shall be made from the United States to the Empire of China.

And said process shall be executed by Hon. C. D. MacDougall, U. S. marshal for said district.

In testimony whereof, I have hereunto signed my name officially and affixed my seal this 20 day of July, 1901.

[L. S.] FRED W. DUDLEY,
United States Commissioner, Northern District of New York.

Indorsed: Judgment.

Indorsement on cover: U. S. com'r's court, northern dist. of N. Y. Misc. 27. United States ag'st Chin Ying. Com'r's return. Filed Sep. 9, 1901, W. S. Doolittle, clerk.

25 *Order Dismissing Appeal and Affirming Decision of United States Commissioner.*

At a special term of the United States district court, for the northern district of New York, held at the Federal building, in the city of Utica, on the 11th day of September, 1901.

Present: Hon. Alfred C. Coxe, U. S. district judge, presiding.

THE UNITED STATES OF AMERICA
vs.
CHIN YING.

The appeal in the above-entitled action having been brought on for hearing, at a special term of the United States district court, held at the Federal building, in the city of Utica, in and for the northern district of New York, and after hearing John B. Riley, Esq., attorney for the defendant, and George B. Curtiss, United States district attorney, for the United States of America, and after due consideration, it is hereby

Ordered: that the appeal in the above-entitled action be dismissed and that the judgment of deportation of the defendant Chin Ying heretofore made, be, and the same hereby is, affirmed.

A. C. C.

Indorsed: Order. Filed Sep. 11, 1901, W. S. Doolittle, clerk.

26 *Bail Bond.*

UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

Be it remembered that on the 7th day of October, 1901, before me John A. Shields, one of the United States commissioners for the southern district of New York, duly authorized to take acknowledgments of bail, affidavits and depositions, personally came Chin Ying principal, and Michael Morris, surety, and severally acknowledged themselves to owe to the United States of America, each the sum of $500, separately to be levied and made of their respective goods, chattels, lands and tenements, to the use of the United States, if default shall be made in the condition following, to wit:

Whereas, the said Chin Ying is now detained in the custody of the United States marshal for the northern district of New York, under commitment and warrant of deportation issued under the Chinese exclusion acts, which order and warrant were affirmed on appeal to the United States district court for the northern district of New York; and

Whereas, said Chin Ying has taken an appeal to the United States Supreme Court from said order and warrant of said district court, and

Whereas, the Hon. R. W. Peckham, associate justice of said United States Supreme Court in and under said appeal did order that said Chin Ying give a bond in the sum of $500, with
27 sufficient surety for his appearance, to answer the exigency and determination of said appeal, and to personally abide the final decision and determination thereof, in default of which said Chin Ying remain in custody, and did further authorize any United States commissioner or commissioners in the second circuit to take such recognizance, and approve the same;

Now, therefore, the condition of said recognizance is such that if the said Chin Ying shall duly personally appear in said United States district court for the northern district of New York, to answer the exigency and determination of said appeal, and personally abide the final decision and determination of said United States Supreme Court, and of said district court upon the mandate of said United States Supreme Court, upon the condition aforesaid, and upon the entering of said order upon said appeal, and obey and abide the order of said district court, then this recognizance to be void; otherwise to be and remain in full force and virtue. (Signature in Chinese characters.)

Translated CHIN YING. [SEAL.]
THOMAS W. G. WALLACE,
Chinese Interpreter.
MICHAEL MORRIS. [SEAL.]

Taken and acknowledged before me the day and year first above written as to Michael Morris, surety.

[L. S.] JOHN A. SHIELDS,
U. S. Commissioner, Southern District of New York.

Taken and acknowledged before me this 12th day of October, 1901, as to Chin Ying, principal.

[L. S.]

FRED W. DUDLEY,
U. S. Commissioner, Northern Dist. of New York.

28 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Michael Morris being duly sworn, deposes and says: That he resides at No. 79 Bayard street, New York city and is worth upwards of $10,000 over all his liabilities; that he is the owner in fee-simple of premises No. 170 Ludlow street in the city and county of New York, which are worth the sum of $33,000, and are subject to mortgages aggregating the sum of $23,000, but not to any other incumbrances whatever; that he makes these statements in order to secure his acceptance as bail herein.

MICHAEL MORRIS.

Sworn to before me this 7th day of October, 1901.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. N. Y.

I, John A. Shields, U. S. commissioner for the southern district of New York, do hereby by virtue of the order of Hon. Rufus W. Peckham, made herein October 1st, 1901, approve of the form of the foregoing bond, and also of the sufficiency of the surety thereto.

Dated New York, October 7th, 1901.

JOHN A. SHIELDS,

[L. S.] *U. S. Commissioner, S. D. N. Y.*

Indorsed: Bail bond. Filed Oct. 15, 1901, W. S. Doolittle, clerk.

29 *Petition for and Allowance of Appeal, with Stay and Proof of Service.*

United States Supreme Court.

UNITED STATES, Appellee,
vs.
CHIN YING, Appellant.

To the justices of the Supreme Court of the United States:

Chin Ying the appellant defendant herein hereby applies for the allowance of an appeal to the Supreme Court of the United States, from the judgment, order and decision of the United States district court for the northern district of New York, entered herein on the 12th day of September, 1901.

LEWINSON, KOHLER & SCHATTMAN,
Attorneys for Appellant.

The foregoing application is granted and appeal allowed, and it is further ordered that this appeal shall operate as a supersedeas,

and the execution of the warrant of deportation is stayed pending the appeal.

Dated Albany, Oct. 1st, 1901.

R. W. PECKHAM,
Associate Justice U. S. Supreme Court.

30 United States Supreme Court.

UNITED STATES, Appellee,
vs.
CHIN YING, Appellant.

Due service of the petition for and allowance of appeal, with stay of execution of warrant of deportation pending appeal, and order authorizing bail endorsed thereon, bond for damages and costs, with approval endorsed thereon, assignment of errors and citation in the above-entitled action is hereby admitted.

Dated New York, October 7, 1901.

GEO. B. CURTISS,
U. S. Attorney for the Northern District of New York.

Indorsed: Petition for and allowance of appeal with stay & proof of service. Appellant is authorized after service of the citation herein to give bail pending the appeal in the sum of $500 with sufficient surety, and any U. S. commissioner or commissioners within the second circuit is authorized to take and approve such bail bond. Oct. 1, 1901. R. W. Peckham, assoc. just. U. S. Sup. Court. Filed Oct. 15, 1901, W. S. Doolittle, clerk.

31 *Bond for Damages and Costs.*

United States Supreme Court.

UNITED STATES, Appellee,
vs.
CHIN YING, Appellant.

Know all men by these presents that we, Chin Ying, as principal, and Lee Yick You, surety, are held and firmly bound, jointly and severally, unto the above-named United States in the sum of two hundred and fifty dollars, to be paid to the United States, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, dated the 30 day of September, 1901.

Whereas, the above-named Chin Ying has prosecuted an appeal to the United States Supreme Court to reverse the order made and rendered in the above-entitled proceeding by the judge of the district court of the United States for the northern district of New York;

Now, therefore, the condition of this obligation is such that if the

above-named Chin Ying shall prosecute said appeal to effect
32 and answer all damages and costs, if he shall fail to make the said appeal good then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

LEE YICK YOU. [SEAL.]

STATE OF NEW YORK, }
County of New York, } ss:

Lee Yick You being duly sworn, says that he is the surety named in and who executed the foregoing bond or undertaking; that he is a resident and householder within the State of New York, residing at 34 Pell street, in the city of New York, and is worth upwards of the sum of $1,000 — dollars over and above all his debts and liabilities, and exclusive of property exempt by law from levy and sale under execution.

LEE YICK YOU.

Sworn to before me this 30 day of September, 1901.

LEWIS M. WHITE,
[L. S.] *Notary Public, New York Co.*

COUNTY OF NEW YORK, ss:

On this 30 day of September, 1901, before me personally came and appeared Lee Yick You to me known and known to me to be one of the individuals mentioned and described in and who
33 executed the foregoing instrument and he duly acknowledged to me that he executed the same.

LEWIS M. WHITE,
Notary Public, New York Co.

Indorsed: Bond for damages and costs. Approved October 1st, 1901. R. W. Peckham, associate justice, U. S. Supreme Court. Filed Oct. 15, 1901, W. S. Doolittle, clerk.

34 *Assignment of Errors.*

United States Supreme Court.

UNITED STATES, Appellee, }
vs.
CHIN YING, Appellant. }

The above-named appellant on this appeal from the order of the district court of the United States for the northern district of New York, affirming the order of deportation of U. S. Commissioner Dudley, for his assignment of errors herein alleges and complains that the order appealed from and the proceedings in said court and before said commissioner are illegal, irregular and erroneous for each and all of the following reasons:

First. In not holding that appellant is a citizen of the United States by birth, and not subject to the provisions of the Chinese

exclusion acts, and that the commissioner and judge ordering appellant's deportation had no jurisdiction over his person;

Second. In not holding that said commissioner and court had no jurisdiction over appellant, because appellant was proceeded against by complaint which was not under such oath as is required by law, and the same was insufficient to confer jurisdiction;

35 Third. In not holding that appellant is held in custody in violation of his constitutional rights as a citizen of the United States, he having been required by affirmative proof to prove to the satisfaction of such commissioner and court his right to be and remain in the United States in accordance with section 3 of the act of May 5th, 1892, and in ordering his deportation for failure so to do, whereas said provision of law is unconstitutional as applied to appellant who is and claimed to be a citizen of the United States by birth, of Chinese extraction.

Fourth. In not holding that section 3 of the act of May 5th, 1892, is inoperative and stands repealed by the treaty of the United States with China, promulgated in 1894, and that a correct and proper construction of said treaty required a holding that said provision stands repealed and of no effect.

Fifth. In not holding that said commissioner and said court had no jurisdiction over appellant under said Chinese exclusion act, or other provision of law, in that the treaty of the United States with China, promulgated in 1894, does not authorize any proceedings against Chinese persons found within the United States, charged with unlawful entry into the United States, before any United States judge, court or commissioner, and said treaty of the United States with China repealed the provisions of law theretofore in force conferring jurisdiction over proceedings for the deportation of persons of Chinese extraction found in the United States.

36 Sixth. In not ordering appellant's discharge from custody.

Seventh. In not holding upon the evidence that appellant's American citizenship was established.

LEWINSON, KOHLER & SCHATTMAN,
Attorneys for Appellant.

Indorsed: Assignments of errors. Filed Oct. 15, 1901, W. S. Doolittle, clerk.

37 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the United States of America and the United States marshal for the northern district of New York:

You are hereby cited and admonished to be and appear before the United States Supreme Court, at Washington, in the District of Columbia, on the 29th day of October, 1901, pursuant to an appeal on the part of the petitioner herein, Chin Ying, filed in the clerk's office of the said court in a certain suit or proceeding entitled: United

States *vs.* Chin Ying, to show cause, if any there be, why the decision of the United States district court for the northern district of New York, in the said appeal mentioned, should not be reversed, modified or corrected, and speedy justice should not be done in that behalf.

Given under my hand at the city of Albany in the second circuit, this 1st day of October, 1901.

R. W. PECKHAM,
Associate Justice U. S. Supreme Court.

38 [Endorsed:] Misc. 27. U. S. Supreme Court. United States *vs.* Chin Ying. Citation (Original) Lewinson, Kohler & Schattman attorneys for appellant 119 Nassau St. (Temple court), borough of Manhattan, New York city, N. Y. U. S. district court, N. D. of N. Y. Filed Oct. 15 1901 at — o'clock — m. W. S. Doolittle, clerk. D.

39 UNITED STATES OF AMERICA, *Northern District of New York,* } ss:

I, William S. Doolittle, clerk of the district court of the United States of America, for the northern district of New York, in the second circuit, do hereby certify, that the foregoing pages, numbered from 1 to 38 inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of United States *vs.* Chin Ying as the same remain of record and on file in said office. (Photograph attached to Plaintiff's Exhibit "A" omitted.)

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of Utica, in the northern district of New York, in the second circuit, this first day of November, in the year of our Lord, one thousand nine hundred and one and of the Independence of the said United States, the one hundred and twenty-sixth.

Seal United States District Court, N. Dist. of New York.

W. S. DOOLITTLE, *Clerk.*

Endorsed on cover: File No. 18,379. N. New York D. C. U. S. Term No. 526. Chin Ying, appellant, *vs.* The United States. Filed January 21, 1902.

No. 503.

Motion to advance

Filed Jan. 20, 1902.

Office Supreme Court U. S.
FILED
JAN 20 1902
JAMES H. MCKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, APPELLANT,
v.
LEE YEN TAI. } No. 503.

UPON CERTIFICATE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, APPELLANT,
v.
LEE YEN TAI. } No. 503.

UPON CERTIFICATE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION TO ADVANCE.

This Chinese person, claiming to be a merchant, was found to be a laborer and was ordered to be deported by a United States commissioner in the northern district of New York. While the United States marshal was proceeding to execute the order of deportation, the Chinaman was taken from his custody under a writ of *habeas corpus* issued by the United States district judge for the southern district of New York. Judge Brown discharged the Chinaman, and pending appeal by the United States admitted him to bail in the sum of $300.

These facts in more detail, leading up to the question certified, appear in the certificate.

The grounds of the application for *habeas corpus* were the assertions that the petitioner is not a laborer nor subject to the exclusion laws; that the commissioner was without jurisdiction to deport, especially in

view of the treaty of 1894; that under that treaty, which nullified the exclusion laws, the courts have no authority to deport a Chinese person.

The appeal of the United States embraced a motion to vacate the order admitting to bail, on the ground that the laws clearly forbade the admission to bail of a Chinese person held under an order of deportation, and that the power of the district court, after allowance of appeal, was restricted to the grant of a stay, and that the Chinaman, therefore, should have been returned into the custody of the marshal pending appeal

Various related questions of jurisdiction and on the merits under the treaty and laws were argued in the circuit court of appeals, resulting in the certification by that court of the single question now submitted here. In the meantime, the circuit court of appeals has taken no action on the question of admission to bail.

The Solicitor-General respectfully moves that this cause be advanced and assigned for argument at an early day, for the following reasons:

1. The question is fundamental and goes to the validity of most of the existing Chinese exclusion laws. To deny their validity is a startling proposition. The Government believes it to be manifestly untenable. Whether or not well-founded, the doubt should be resolved promptly, in order that the laws may be rightly understood and enforced.

2. Numerous appeals to this court by Chinamen, in some of which the merchant status is claimed and in

others the right of native-born citizens, are dependent in principle upon the question submitted in this case. Such appeals are constantly coming forward. The present indications are that the court will be unduly burdened by them if the issue is not soon brought to hearing and disposed of. There is no reason apparent why appeals will not be taken in all cases hereafter in which a Chinaman is ordered to be deported; and most of them involve the admission to bail allowed while the order of deportation is in process of execution. This, the Government submits, is contrary to the purpose and meaning of the law, and obviously encourages frivolous appeals. The question of bail will be raised by the Government at an early opportunity, but does not seem to be properly before the court in this case. Due motion on that point will be made in other pending cases, which are typical of the entire controversy, and in which, also, the Government will move to advance for hearing on the merits with the present case. If such appeals by Chinamen and the *habeas corpus* applications from which they flow are an unwarranted perversion of legal procedure, in view of the well-established doctrines and rules governing the Chinese exclusion laws and proceedings thereunder, as the Government strongly contends, or, if it be true, on the other hand, that the Chinamen have such rights as are claimed, it is most important that the controversy be set at rest at the earliest practicable date.

It is respectfully submitted that the question under this certificate should be advanced for hearing at as

early a day as may consist with the convenience of the court. I am authorized to say that counsel on the other side agree that the cause should be advanced.

Since this motion was prepared we are advised that the circuit court of appeals on the 15th instant handed down its opinion in the case, which is printed as an appendix hereto. It will be observed that no definite action was taken upon the motion to vacate the order admitting to bail, that court in effect committing the whole case to this court under their conclusion to reserve judgment and certify the question sent here. We therefore submit to the court the additional point whether it will not be proper for the court of its own motion to cause the entire record in the court below to be certified to this court for consideration, in connection with this and other similar cases, on the merits, and in respect to the point regarding bail.

JOHN K. RICHARDS,
Solicitor-General.
HENRY M. HOYT,
Assistant Attorney-General.

APPENDIX.

United States circuit court of appeals, second circuit.

THE UNITED STATES, APPELLANT,
v.
LEE YEN TAI, APPELLEE.

WALLACE, Circuit Judge:

This is an appeal from an order in habeas corpus made by the United States district court for the southern district of New York, discharging Lee Yen Tai from the custody of the marshal for the northern district of New York.

The writ issued upon the petition of Lee Wah, a brother of Lee Yan Tai, setting forth in substance that Lee Yen Tai, being lawfully entitled to be and remain in the United States, pursuant to the Constitution and the laws thereof and the treaty with China promulgated in 1894, was imprisoned and held in restraint by the marshal by color of a warrant for his deportation issued by a United States commissioner for the northern district of New York without jurisdiction. The return of the marshal set forth the warrant. The warrant recited in substance that the petitioner was arrested and brought before the commissioner on the charge of being a Chinese laborer seeking to enter the United States without producing the certificate prescribed by law and not entitled to be or remain within the United States, and thereafter upon a hearing and trial was found guilty of the charge, whereupon the commissioner adjudged that

he be immediately removed to the Empire of China by the United States marshal for said district.

Upon the hearing in the district court no evidence was introduced, and the case was decided upon the facts set forth in the petition and the return. As no opinion was written by the district judge, it may be inferred that the decision proceeded upon the ground that the treaty of 1894 between the United States and China operated as a repeal of the preexisting statutes providing for the deportation of Chinese citizens unlawfully within the United States.

The assignments of error assume that the decision proceeded upon this ground, and challenge the construction placed by the court upon the treaty. If the appeal presented no other question than the correctness of this ruling, this court would be without jurisdiction to entertain it. The circuit court of appeals has no jurisdiction in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty is drawn in question. In such cases an appeal or writ of error lies directly to the Supreme Court, and the circuit court of appeals can only exercise appellate jurisdiction in cases other than those. Authority, however, is given the circuit court of appeals in every "subject within its appellate jurisdiction" to certify to the Supreme Court any question of law concerning which it desires the instruction of that court "for its proper decision." (Act of March 3, 1891, section 6.) The Supreme Court in several cases has held that although a case which has been brought to the circuit court of appeals by an appeal or writ of error may involve a question which that court has no jurisdiction to entertain, it may nevertheless, if the case also involves other questions, determine those ques-

tions and certify to the Supreme Court the question which it may not entertain. *United States* v. *Jahn* (155 U. S., 109); *Carter* v. *Roberts* (177 U. S., 496). In the latter case the court used this language: "When cases arise which are controlled by the construction or application of the Constitution of the United States a direct appeal lies to this court, and if such cases are carried to the circuit court of appeals those courts may decline to take jurisdiction, or where such construction or application are involved with other questions may certify the constitutional question and afterwards proceed to judgment, or may decide the whole case in the first instance." This language is relied upon by counsel for the appellant as meaning that the circuit court of appeals may, in deciding the whole case, decide the constitutional question, or, as in this case, a question involving the construction of a treaty. We do not regard it as intended to bear that meaning, and as we read the language it means simply that the circuit court of appeals may decide the whole case by affirming or reversing the decision under review without passing upon the constitutional or treaty question, or, if it sees fit, may reserve judgment and certify that question.

Passing to the questions which this court has power to determine, they may be summarily disposed of. The only assignments of error other than those respecting the construction of the treaty are that the court erred in discharging the defendant, that it erred in not ordering him back into the custody of the marshal, and that it erred in not dismissing the writ. The assignments do not comply with the rule, as they do not set out particularly the error intended to be urged. The court is at liberty, however, to notice a "plain error

not assigned." The more important of the errors which have been urged allege defects of form in the petition which might have been cured by an amendment if they had been taken in the court below. They do not appear to have been taken there, and can not be raised for the first time upon appeal.

There certainly is no "plain error" in the case to justify a consideration of questions not presented by the assignments. Except for the importance of the decision of the court below in its bearing upon other cases which may arise under the Chinese exclusion laws, we should consider it to be our duty to affirm the order of the court below, without certifying any question for instructions to the Supreme Court; but it is so desirable in the public interests that the error of construction, if there was one, be corrected promptly, that we have concluded to reserve judgment and certify the question for instructions.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

CHIN BAK KAN, APPELLANT,
v.
THE UNITED STATES. } No. 525.

CHIN YING, APPELLANT,
v.
THE UNITED STATES. } No. 526.

ON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

The Solicitor-General respectfully moves the court to advance these cases for hearing at an early day along with the case of Lee Yen Tai, in which a motion to advance has recently been made. This motion is made for the same reasons respecting the importance of the issue and the desirability of prompt hearing and determination, in order that the laws may be rightly understood and enforced, as were given on that motion. The present cases may aptly be heard with the Lee Yen Tai certificate as one case, so far as the argument is concerned. The hearing on the associated records will fully present the controversies now raised in many

cases constantly coming to the court, and thus will economize the time and labor of the court.

Notice of this motion has been served on counsel for the appellants.

JOHN K. RICHARDS,
Solicitor-General.
HENRY M. HOYT,
Assistant Attorney-General.

No. 525 & 526

Supreme Court U.S.
FILED
JAN 24 1902
JAMES H. MCKENNEY
Clerk

Brf. of Atty. Gen. (Assistant Solr. Hoyt) for United States (On mo.

Filed Jan. 24, 1902.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

CHIN BAK KAN, APPELLANT,
v.
THE UNITED STATES. } No. 525.

CHIN YING, APPELLANT,
v.
THE UNITED STATES. } No. 526.

ON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

MOTION ON BEHALF OF THE UNITED STATES TO VACATE ORDER ADMITTING TO BAIL, AND BRIEF THEREON.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

CHIN BAK KAN, APPELLANT, v. THE UNITED STATES. } No. 525.

CHIN YING, APPELLANT, v. THE UNITED STATES. } No. 526.

ON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

MOTION ON BEHALF OF THE UNITED STATES TO VACATE ORDER ADMITTING TO BAIL, AND BRIEF THEREON.

These are cases of Chinese persons who claim to be native-born citizens of the United States and therefore entitled to be and remain in this country, but who were adjudged by a United States commissioner and by the United States district court, on appeal, in the northern district of New York, not to have established their claims, and were therefore ordered to be deported as alien Chinese laborers (Rec., No. —, p. —; No. —, p. —). These appeals followed and thereupon, by order of Mr. Justice Peckham, dated October 1, 1901, the orders of deportation were stayed, the appeals operating as *supersedeas*, and the Chinamen were admitted to bail, pending further proceedings, in the sum of $500 each (No. —, p. —; No. —, p. —). Bail was then entered in each case to abide the result of appeal,

and the Chinamen were set at liberty. The present cases, it will be observed, present a claim of citizenship; the Government understands that cases, otherwise identical in general character, which for whatever reason have not yet been brought forward by opposing counsel herein, present the merchant claim.

These cases are typical of a large number of cases now in or on the way to this court. In some the transcripts have been received but not filed; in some the time for filing has been enlarged; in some bail has been refused by the lower courts pending determination of the question by this court. Excepting these two cases, which have been docketed, and in which the records have been printed in order that this preliminary question may be determined, none of these cases has been docketed by appellants.

These are the facts. We do not entertain and do not mean to suggest any prejudicial inference.

remanded to the custody of the marshal pending appeal. This motion is based upon the following points submitted in argument:

I.

The prohibition of admission to bail in such cases, more explicitly referred to in paragraph II, is a necessary result of the general policy and general scheme of the laws excluding and expelling certain Chinese persons.

Existing laws exclude and expel Chinese persons not entitled by these laws to enter the United States

or remain there. The validity of these laws has been fully upheld by the court, regarding the fundamental rights of sovereignty and the power of Congress. It is idle to question here the wisdom or policy of these laws. On the merits in the present cases the astonishing proposition is advanced that the treaty of 1894 has repealed or abolished most of the existing laws—in particular has demolished the entire superstructure upon which practically all the deportation cases rest. As I understand the contention, it asserts that Chinese seeking admission are not now required to present themselves to the immigration officers at the port or frontier; that if they fail to do so and enter clandestinely, they are nevertheless entitled to remain even if laborers; that at all events there is now no authorized machinery of the law to enforce their deportation if they are found within our borders; and that the only exception is in the case of laborers who were here and were not registered under the acts of 1892 and 1893, or who, being here and being duly registered, and having left temporarily, have returned and by evasion have reentered the country without complying with the law. In short, the argument is that a Chinese person of the permitted classes without a certificate, or a Chinese laborer coming for the first time, who get into the country, no matter by what clandestine and illegal means, are entitled to remain.

This notion is so strained, so illogical, and so unsubstantial that it does not even merit the praise of being ingenious. Our argument on these points will be duly made at the hearing on the merits, but for

the purposes of this subsidiary motion we may safely proceed upon the law as it has been universally supposed to be ever since as well as before the treaty of 1894, and as this court has manifestly assumed it to be in view of the decisions.

In the case of *The United States* v. *Mrs. Gue Lim* (176 U. S., 459) the court adverts to the Government contention that under the treaty of 1894 the certificate requirements of the sixth section of the act of 1884 apply to all permitted Chinese subjects who seek to enter this country, and uses the following language:

> We do not think the treaty of 1894 alters the result flowing from the treaty of 1880 and the act of 1884. The question is whether under the act of 1884, construed in connection with the treaty of 1880, the wife of a Chinese merchant domiciled in this country may enter the United States without a certificate because she is the wife of such merchant.

The court answered that question in the affirmative for the fundamental reasons given. It is a necessary inference, however, that the court views the treaty of 1894 as generally consistent with the previous treaty and the existing laws, and not as destructive thereof. The court merely and evidently thought that the treaty of 1894 did not create a different or stricter rule in the respect presented.

The case of *Li Sing* v. *United States* (180 U. S., 486), arising in all material points since the ratification of the treaty of 1894, holds that a United States commissioner has authority to hear and determine the

question whether a Chinese person is entitled to remain within the limits of the United States. There the Chinaman contended that he was a merchant (in that case returning to this country) and the commissioner found that he was a laborer. The court speaks of the certificate required by the sixth section of the act of 1884, and does not intimate that the certificate is not now necessary because the treaty of 1894 is permissive (Article III) where the previous act was mandatory.

It may be said that the contentions now made on the appellant's behalf were not raised in these recent cases, but it is safe to reply that this court would of its own motion have interjected into those cases some reflection of the present contentions if they possessed the slightest merit

I repeat that we may safely deal with this subsidiary motion on the theory that the existing scheme is firmly founded, and reserve all discussion of the novel views on the merits, which counsel advances, for the proper time of argument.

This is the present situation: Chinese laborers coming to the country for the first time are rigidly excluded, not only by the statutes, but under the recognition by the treaty of 1894, the language of which is (Article I) that such coming of Chinese laborers "shall be absolutely prohibited." Certain returning Chinese laborers who have the right to reenter must conform to requirements which both the treaty and the statutes specify. Chinese of the permitted classes must present the certificate required by section 6 of the act of 1884, the

only modification of that statute under Article III of the present treaty being that now Chinese subjects may present the required certificate issued either by the Government of China, or by the Government where they last resided. This has been construed to mean (22 Op., 201) that if the Chinese person comes from China he must present a certificate of the Government of China; if he comes from some other country he must present the certificate of the Government of that country.

All Chinese persons to obtain legal entry must present themselves to the proper customs or immigration authorities at the port of entry, whether a seaport or customs port of entry on the land frontier. The decision of the proper executive authority upon the right of aliens to enter is final in all cases, if adverse to the alien, unless reversed by the Secretary of the Treasury on appeal. Any Chinese person who enters clandestinely is found here unlawfully, although under the new jurisdiction which then attaches—there being no provision to return such persons to the executive authorities at the frontier for their decision, or to apply that decision (if one has been made) as conclusive on the commissioner—the right to be and remain here may be investigated and determined in the judicial jurisdiction which has attached because the Chinaman is within the country. The Chinaman must establish by affirmative proof, to the satisfaction of the judicial officer, his lawful right to remain in the United States, and if he does not, he must be deported.

Under a section of an act, the validity of which in whole or in part has been questioned (section 13, act September 13, 1888), a Chinese person ordered to be deported by the inferior judicial officer (the commissioner) may appeal to the district judge, and such appeals are constantly taken (as herein) and are not resisted by the Government as unauthorized. This course by appeal (however far the appeal may legitimately be carried) is the only remedy expressly given the Chinaman, and was meant to be the exclusive remedy. This is manifestly so. Deportation proceedings are not criminal; deportation is not punishment for a crime, although general aspects of the subject may fall in with criminal analogies. So that when Congress (assuming section 13 of the act of 1888 to be in force) in its full power to deal with these matters, gave the Chinaman the limited right of appeal, they meant to give him and gave him no other privilege of review, and when he has exhausted his statutory appeal he has exhausted all his remedies. Section 12 of the act of 1884, an act undoubtedly in force, directs, or rather compels, deportation if the Chinaman is found by the justice, judge, or commissioner to be not lawfully entitled to remain in this country, and there is no provision for appeal. These statements are directed against the unwarranted use of *habeas corpus* superimposed upon appeals which have been finally determined, in cases related to and grouped with these two cases. We do not mean to argue that aspect of the merits, but merely refer to it to point out the plain confines of allowances in favor of Chinamen.

Now, just as the scheme of executive decision at the seaport or frontier is final, even when the Chinese person claims that he is entitled of right by some law or treaty to enter this country, and that the immigration officers have exceeded their jurisdiction, so in these deportation cases, which mostly arise in fraudulent claims of merchant or citizen status by Chinamen, whose clandestine entry does not strengthen the equity or pathos of their situation, the scheme manifestly is to make final the decision of the commissioner or the judge (as the case may be), at least upon the facts. It is certainly well settled as a controlling principle that in no event may the facts be reexamined nor any other questions be considered and determined than the jurisdiction of the commissioner (or judge) and the legality of his order; that is, the only questions are, Does the law authorize the commissioner to proceed, and does the law empower him to enter his order? We understand that opposing counsel concede the correctness of this doctrine and its applicability to the present issue on the merits. Such seems to have been their position at the hearing of the Lee Yen Tai case in the circuit court of appeals.

We have stated, perhaps at wearisome length, what we believe to be the true conception of the law and procedure on Chinese exclusion and deportation. The Government, under the law, is seeking to keep out and send away Chinese persons who are not authorized to enter or remain, especially laborers, and the well-known fact of the matter is that the large majority of

cases are those of laborers masquerading under the merchant character or claiming the sacred right of citizenship. It is an essential part of the exclusion and deportation scheme that when a Chinaman has been ordered to be deported he shall not be allowed to go at large pending the time while the order is being carried out. Thus the laws presently to be cited provide, and their undoubted import is, that the Government shall retain custody of the Chinaman during the whole intervening period, however long the delays caused by efforts on the part of the Chinese to postpone the execution of the order, to pursue appeals, and to invoke *habeas corpus*. The Government can not delay this matter; the mandate of the law is that the marshal shall execute the order of deportation with all convenient dispatch (section 2, act of November 3, 1893). In fine, the legal scheme necessarily means that no opportunity of escape is to be allowed, and that the penalty under such bonds as are accepted, and, indeed, under any bonds which might be exacted, is not to be regarded as the price of permitting a defaulting principal to make his escape good, and (because of the practical immunity of an escape to Chinese quarters and conditions) to remain in this country.

As noted above, it happens that in these particular cases the remedy sought was by direct appeal from the district court to this court, and not by the interjection of *habeas corpus* while the Chinaman was *en route* to the port of shipment under the order of deportation. But the same questions are involved in cases now

before the court, or on the way to the court, in which the writ of *habeas corpus* was invoked. The case of Lee Yen Tai before the court on certificate is one of this nature, as is also the case of Liu Tsz Tsin. In the latter case there was an order of deportation signed by the United States district judge for the district of Vermont. While the Chinaman was in the custody of the United States marshal at the port of shipment, New York, a writ of *habeas corpus* was sued out, and on hearing before the United States district judge in the latter district the writ was dismissed and the petitioner remanded, and an appeal to this court from the order dismissing the writ was allowed by the district judge. In the same case the same procedure had previously been followed and an appeal allowed to the circuit court of appeals; this earlier appeal was afterwards withdrawn. The appeal to this court has not yet been perfected.

It is also true that both of the cases now before the court involve the claim of citizenship; but the Government understands that other cases are on the way, in which the claim advanced by the Chinamen, but denied by the lower tribunals, was that of merchant character. We contend that the principles forbidding the allowance of bail apply throughout the whole situation, to appeals in the usual course as well as to *habeas corpus* proceedings; and that the latter proceedings only illustrate more forcibly the perversions or errors on the subject and the undue delays imposed upon the orderly execution of the laws. It may be true that the

sacredness of the writ of *habeas corpus* and the sacredness of the claim of citizenship would properly lead the courts to exercise their discretion liberally, and take such cases out of the usual course of Chinese cases, where they would not so act respecting the merchant claim. The case of Li Sing, *ante*, was, however, one of *habeas corpus* on behalf of an alleged returning merchant. Such prepossessions perhaps explain the increase in the number of the "native born" claims. In effect, another appeal is thus more certainly obtained.

But however such points may appear to be on the merits—in respect to bail, just as the proper rules on that subject should apply in the case of regular appeals, as in the case of a review by *habeas corpus* and appeal thereon, so they should apply whether the claim of merchant character or of native-born citizenship is made. The right of citizenship is sacred from the point of view of denouncing and preventing its abuse quite as fully and clearly as from the point of view of extending it as a shield over those who justly and honestly claim it. To assert that right under circumstances and in cases in which it is often fraudulently asserted is not to make the title. It may be proper, because of its character, to bring it before the courts for ultimate determination on the merits, and it is conceded that the executive officers at the seaport or the frontier can not determine it conclusively, because the authority of their decision as final is restricted to the case of aliens; yet no reason is

perceived why in the first instance the immigration officers may not pass upon this question as they constantly do in practice, whereupon alleged citizens, who are excluded, in many cases sue out *habeas corpus*. But there is no such limitation to alienage in the jurisdiction of the United States justice, judge, or commissioner. He is entitled to pass upon the question of citizenship, and even in respect to that important question he must be satisfied by affirmative proof that the Chinaman is entitled to be and remain here; and if he finds to the contrary, as in these cases, reasons may quite probably be urged on the merits by opposing counsel why his conclusion should not be regarded as final, along with the argument that the commissioner has no jurisdiction. But in any event a prima facie case has been made out against the Chinaman, and an order of deportation has been legally entered, just as much in the case of the citizen claim as in the case of the merchant claim. Therefore we say that the same considerations respecting the admission to bail apply to the one case as to the other, and those considerations are operative throughout the whole extent of the controversy.

Furthermore, it happens that in these cases the appeals to this court are by the Chinamen. In case the Government were appealing and an order admitting to bail were entered, we believe that the contention that this step was unwarranted would justly apply, the principle involved covering review on appeal by either party. But certainly less merit

exists in the contention of the Chinese persons as to bail, when it is they who take the appeal and who are not satisfied to rest upon the result of the only appeal which the law expressly allows them. The hearing and decision on the merits will determine whether there is anything substantial in the propositions upon which further appeal to this court is based.

It is further to be observed that the main argument on the merits in these cases is not that Chinese persons who are citizens of the United States must of necessity be allowed to remain here, but that no alien Chinese persons, with few exceptions, can now be deported. There is a confession and avoidance here which is very significant, and this significance affects the equity as well as the legality of the claim to enter bail. If the discretion of a judge were untrammelled (as we contend below that it is not), the real ground of the Chinamen's case, viz, that the treaty of 1894 permits Chinese aliens, formerly subject to deportation, now to remain here, might well incline the judge's discretion to repudiate the notion of the right claimed on the ground of citizenship as disingenuous and lacking in *bona fides*.

II.

General laws on the question of bail which do not apply, and special laws which control the point.

The matter of admission to bail is, in general, committed to the sound discretion of a judge, unless some restraint has been imposed upon the exercise of discretion. None of the sections of the Revised Statutes

referred to in the index under the caption "Bail" affect this case. The case is not a criminal case, and therefore is not covered by sections 1014 and 1015; and if, in their anomalous character as quasicriminal, such causes should nevertheless be regarded as among the civil causes in which, by section 945, a certain scope of authority is given to United States judges and commissioners to take bail, that statute must be held to be governed by the exclusive laws on the subject of bail in Chinese cases as, indeed, must all general and earlier laws on the subject of bail. Section 1014 brings into the subject the general rule of guidance in matters of practice in Federal cases according to the practice and process in a particular locality. But we contend that no analogies exist between the rules as to taking bail in various civil proceedings under many State laws and this particular proceeding in Chinese cases, which in its nature and incidents is *sui generis*. Such State laws allowing admission to bail as of right, or in the discretion of the courts, are applied definitely, and we think exclusively, to certain specific forms of action, and can not be made to embrace the cases now before the court. We submit that there is no express statute, and not even any generally established practice, from which it can be implied that authority exists to admit to bail in cases arising under the Chinese exclusion laws. The laws which authorize admission to bail upon isssing of an order of arrest in a civil action, or in any other proceeding civil in its nature, are explicit, definite, and limited, and have no application whatever to the present proceedings.

But it may truly be said that these Chinese persons have committed an offense against the United States, even if they have not committed a crime, and that while the word "offense" in section 1014 is to be construed by the associated word "crime" it fairly enough includes these proceedings, which are at least quasi-criminal; and it may thereupon be urged that it seems a total perversion of law as well as justice to say that bail may be taken almost as matter of course in all criminal cases which are not capital, and yet must be refused in this merely technical offense, not involving a high degree of moral turpitude. Our reply to that position is that the Chinese exclusion laws have expressly controlled this matter and left no scope for a court's discretion or for the application of general notions of ethics and equity. We do not admit, of course, that such notions in this proceeding would be well founded.

Section 5 of the act of May 5, 1892, provides that "after the passage of this act, on an application to any judge or court of the United States in the first instance for a writ of habeas corpus by a Chinese person seeking to land in the United States to whom that privilege has been denied, no bail shall be allowed, and such application shall be heard and determined promptly without unnecessary delay."

This does not apply to the case of Chinese persons found within the country; but the reason and purpose of that provision are manifest, and are consistent with the comprehensive intention of Congress manifested

throughout the laws, strictly to prevent unauthorized Chinese persons from getting into the country or remaining therein. It illustrates, or rather manifests, the resolution to take no risk of escapes after the entry of bail, and led to the next logical step contained in a paragraph of section 2 of the act of November 3, 1893, namely:

> Such order of deportation shall be executed by the United States marshal of the district within which such order is made, and he shall execute the same with all convenient dispatch; and pending the execution of such order such Chinese person shall remain in the custody of the United States marshal, and shall not be admitted to bail.

Now, because the act of 1893 in its first section expressly amended section 6 of the act of 1892, which required the registration of laborers and permitted the registration of other Chinese persons having a right to remain in the United States, opposing counsel argued below in the Lee Yen Tai case, and will probably argue here, that the words "such order" in section 2 of the act of 1893 restrict the prohibition of bail to cases in which a nonregistered laborer is ordered to be deported. That contention is evidently not well founded. The Chinese-exclusion laws are all to be read together; they are regarded as a connected scheme. The act of 1893 shows by its title that it was passed to amend the act of 1892, and the act of 1892 continued in force for ten years all of the existing Chinese-exclusion laws. Section 12 of the act of 1884

and section 2 of the act of 1892 provide for the deportation of *any* Chinese person or person of Chinese descent who is convicted and adjudged under any of said laws to be not lawfully entitled to be and remain in the United States. Section 2 of the act of 1893 deals with other branches of the subject than the registration of laborers, and, therefore, where the words "such order of deportation" are used, they refer to any order of deportation of a Chinese person, and not only to an order of deportation of a nonregistered laborer.

Furthermore, whether or not it would be a proper and worthy act for this Government to provide now for another registration of all Chinese in this country, in order to validate the residence here of those who were not here or were not registered under the acts of 1892 and 1893, it is perfectly clear that the registration of 1892–93 was in order to provide a check by which those laborers who were in the country and were allowed to remain here might be distinguished from the numerous laborers who thereafter entered clandestinely against the prohibition of the laws. Consequently, in the deportation in this case, in which the commissioner's finding was that these men were Chinese laborers and not native-born citizens (and manifestly, as they were claiming to be native-born citizens, they were not laborers duly registered), their cases fall under the strictest view of the paragraph of the act of 1893 prohibiting the taking of bail. These orders of deportation were such orders of deportation as the act meant, in any case,

since these men were in fact Chinese laborers who were not registered. Either they were here when the time for registration under these acts expired, or they were not. If they were here, then their failure to register condemns them, and they clearly should go out as nonregistered laborers. If they were not here, then they must have come since the time limit of registration expired, and the fact that it is incongruous now to expect them to register when they were not here in time to do so has nothing to do with the controversy. That is one of the ways in which the United States protects itself. They are nonregistered laborers just the same, and it is far more incongruous with the situation that, being laborers, they should come here and be found here at all against the prohibition of the many provisions of law directed against them. Laborers can not come here at all, both by force of the treaty and the statutes.

We contend, then, that in all such cases the admission to bail is not only not warranted under general laws and upon the usual committal of that subject to the sound discretion of a judge, but is absolutely prohibited by these special laws which govern the matter.

This contention also affects the principles respecting the operation of an appeal as supersedeas. The supersedeas specifically granted in this case may operate duly and with ordinary effect even if it is not permitted to justify or sustain the application for bail.

So far as similar proceedings on *habeas corpus* (and appeals thereon) may be considered in connection with

these appeals, we have only to submit with respect that the statutes, including sections 763–765, Revised Statutes, and the rules of this court (No. 34, paragraphs 2 and 3), adopted long before the enactment of the laws of 1892 and 1893, must be held to be affected and limited *pro tanto* by the evident intent and scope of the prohibition of bail in Chinese cases.

It has not seemed necessary to us to lengthen this motion and brief by the citation of authorities. The general propositions which we submit are perfectly plain and well understood, and rest upon established decisions of this court rendered in recent years; and in reference to the particular point about bail it seems sufficient to submit the question to the court, with the statements of this paragraph regarding the laws and principles, and not to state at length the conflicting decisions and inconsistent practice followed upon the subject in the lower Federal courts. It may be that in many cases of this nature bail has been allowed, as in many other cases it has been refused. Various considerations of special hardships or special equities, as well as differing opinions on the law of the subject, have probably influenced (as they might naturally influence) the action of the courts. It is evident that neither the practice nor the law is looked upon as settled and conclusive, even by judges who take a liberal view of the matter, as is shown by the language of Judge Brown in the case of *United States* v. *Du Shen Tau et al.*, not reported apparently, but likely to be quoted *in extenso* by opposing counsel. We have in

mind two cases (*United States* v. *Pin Kwan*, 100 Fed. Rep., 609; *United States* v. *Ping Yik*, id., 1006), cited, we think, in some of opposing counsel's arguments in the courts below, in which the legal officers of the Government did not strenuously resist the admission to bail, not only because there the appeal was by the Government (which, indeed, standing alone, would not be a sound reason either in law or administrative practice, as indicated *supra*), but also because it was the misfortune of the Chinamen in those cases to have had their right to be and remain in this country justly challenged under the law, after they had, through errors for which they were not responsible, been admitted to the country upon their due application to the immigration authorities. These facts and the importance of the issues in those cases, pursuing a delayed course of appeal, led the Government not to insist on raising the point about bail therein.

We refer to those proceedings merely to illustrate how this question has passed along without conclusive determination. It is now before this court for final settlement. The present cases are typical and present fairly to the court, both from the point of view of the Government and of the Chinamen, a situation in which the legal rule may be defined and declared without embarrassment from other extraneous and accidental considerations.

Many of the authorities which opposing counsel seem to have cited in the courts below relate to the point as it stood before the acts of 1892 and 1893

were passed. Their own showing merely goes to prove that some judges have construed their authority and discretion in the matter in a liberal way.

But there are authorities holding to the strict view. We cite one which is typical: In *In re Chin Yuen Sing* (65 Fed. Rep., 788), Judge Lacombe used the following language:

> It is unnecessary to decide the question argued upon this application, viz, whether or not this court is expressly forbidden by statute from releasing on bail pending appeal, where the relator is a Chinese immigrant. Concededly there is such a prohibition where the application is being considered by the court in the first instance. (Act May 5, 1892, sec. 5.) That being so, it would be a singular exercise of discretion which would release an immigrant on bail after the court has decided that he should not be permitted to enter the country, when the statutes require that he shall not be released on bail before the court has so decided, and when there is still a possibility that its decision might be favorable to him. Application denied.

That happened to be a case where the Chinaman was not found in the country, but was seeking to land, and his application was denied by the collector of the port. For that reason it was not necessary for Judge Lacombe to consider the question of bail on such appeals as these, or on any appeal at all, as the proceeding before him was of first instance. But the

force of his argument is very weighty in this controversy, and is applicable with equal effect to the present cases under the act of 1893, which includes, as we think we have shown, all cases of deportation.

Opposing counsel may possibly state that the records of the United States circuit court and of the United States attorney's office show that subsequently Judge Lacombe decided the question of his power and discretion by admitting the defendant to bail pending the appeal. We have no knowedge of these facts; but assuming them to be true, the only remark to be made is that the learned judge construed the reserved point erroneously. The subject is now before this court for settlement and for the correction of such errors as have been committed and followed.

We think we have stated the reasons why the doctrine of this court, announced in the case of *Hudson* v. *Parker* (156 U. S., 277, 285)—regarding the right of persons charged with crime to be admitted to bail not only after arrest and before trial, but after conviction and pending a writ of error—does not apply to such appeals as these nor to *habeas corpus* cases and appeals, on orders of deportation of Chinese persons.

These reasons show why a broad claim of right, sacred indeed when it is well founded, may justify the taking of bail in a criminal case, and yet not justify taking it in these peculiar cases, either upon a regular appeal or upon appeal following *habeas corpus*.

We respectfully submit that this motion should be granted and an order entered vacating so much of the

orders of Mr. Justice Peckham of October 1, 1901, as admits these Chinese persons to bail.

JOHN K. RICHARDS,
Solicitor-General.
HENRY M. HOYT,
Assistant Attorney-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, APPELLANT,
v.
LEE YEN TAI. } No. 503.

ON CERTIFICATES FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

CHIN BAK KAN
v.
THE UNITED STATES. } No. 525.

CHIN YING
v.
THE UNITED STATES. } No. 526.

ON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT.

1.

AS TO LEE YEN TAI.

This case comes up on certificate of the court below. Two certificates were transmitted. The one of later date evidently dismisses or displaces the earlier one.

Lee Yen Tai (an *alias*), a Chinese laborer, unlawfully entered the United States, without producing the required certificate, and was not entitled to remain. So the commissioner in northern New York found, and ordered him to be deported. While in the custody of the marshal for this purpose the district court in southern New York issued habeas corpus. The petition for the writ averred the merchant status; the return setting up the commissioner's adjudication and warrant of deportation was traversed, but no evidence of merchant status was introduced. The court, after hearing, discharged the Chinaman upon bail for appearance. The United States appealed and argument was had in the appellate court, whereupon the following question was certified to this court:

Question. Is section 12 of "An act to execute certain treaty stipulations relating to the Chinese," approved May 6, 1882, as amended by the amendatory act of July 5, 1884, and continued in force by section 1 of the act of May 5, 1892, repealed by the treaty or convention with China proclaimed December 8, 1894?

This is the chief question in all three cases.

2.

AS TO CHIN BAK KAN.

The charge against this Chinaman as a laborer entering unlawfully, without certificate, and not entitled to remain, was the same. The finding of the commissioner was the same, and a similar order of deportation was issued (Rec., p. 16). Part of the evidence was taken before a commissioner, who became ill and could

not finish the case. He overruled an untenable objection of the Chinaman's counsel (p. 5 , but the proceedings were altogether regular, and by stipulation (p. 16) another commissioner of the same district continued and completed the case, considering all the evidence. The Chinaman duly appealed from the latter commissioner's order to the district court, which affirmed the judgment of deportation (p. 19). Upon application to Mr. Justice Peckham an appeal to this court was allowed, to operate as supersedeas with stay of the warrant, and bail was authorized and taken (pp. 19–22).

The evidence (pp. 3–16) shows complete justification for the commissioner's decision. The fraudulent claim is manifest. An alleged uncle of the Chinaman testifies (on April 27, 1901) that he came to this country *twenty-five* years ago; that he has been here in various places ever since, excepting two visits to China of two years each, and was in San Francisco for the first ten years after his arrival, and was living there in the same house with his sister when Chin Bak Kan, her son, was born in the *first* year after arrival; that he knew the son for the *first* seven years of his own residence in San Francisco; that Chin Bak Kan was then (1901) *22* years old. When the certificate of the witness as a registered laborer was produced (p. 5), with his application therefor (p. 10), it appeared that the certificate was issued on February 12, 1894, and that the witness then swore that he landed in the United States on July —, 1879. This date is, of course, inconsistent with his oath that

he had first come to the United States twenty-five years before 1901; that is, in 1876. So that on the facts shown, if Chin Bak Kan is 25 years old, and the uncle was living with his sister and her husband when the son was born, he must have been born in China, or if he was born in this country, the uncle's sworn application for a registered laborer's certificate does not state truly the date of his own first arrival here. Lee Sing testifies positively (p. 11) that the witness (the "uncle," Gong Wing) arrived at San Francisco, per the *City of Pekin*, in July, 1879. This is enough to destroy the alleged uncle's evidence, without regard to its improbable character as a whole. The witness, Lee Sing, testifies that Gong Wing and his alleged sister did not live in the house in San Francisco where the former swears they did live at the time Chin Bak Kan was born; that other people, all men and well known to him, lived there, and that Gong Wing, whom he knew then and still knows, lived in another street (pp. 11–13), It is no wonder that Chin Bak Kan did not satisfy the commissioner by affirmative evidence of his right to be in the United States.

3.

AS TO CHIN YING.

The proceedings, findings, and result were substantially the same in this case as in the last. (Rec., pp. 12, 1 and 2, 13–16.) The evidence brought out a striking disclosure of the fraudulent character of the claim. Again there was an "uncle," who, in the more recent cases, takes the place of the "father" as a witness.

Ching Ying is his sister's son. The son was born in San Francisco, and the uncle was living in the same house with his sister at the time of the birth. There were the same intermediate comings and goings between China and the United States by the uncle and nephew; the same marks of a typical fabrication running through all these cases. In this case the uncle's laborer certificate appeared in evidence (p. 6), but not his sworn application. I am not, therefore, able to say positively whether or not there is an implication of the same variation between the witness's testimony and the application as to the dates of original entry, the "nephew's" birth, age, etc.

Here, as in the Chin Bak Kan case, there is another feature of the usual tale by rote, namely, that the son was born in the first year after the uncle's arrival with his sister and her husband. It was then brought out—the papers showing the facts being received in evidence without objection (pp. 6, 10)—that Chin Ying, under the name of Sum Jim, claiming to be a merchant, had been refused permission to reenter this country as such, and various representations in his behalf as to his merchant status were made to the Secretary of the Treasury. Sum Jim's photograph was attached to his certificate of identification when he left this country for a temporary visit to China in 1897 (p. 9), and the witnesses supporting his claim of merchant status declared that the firm name is a fanciful designation and does not contain the name of any of the partners. Nevertheless, this certificate

did not avail him, and his application to land on his return from China was denied December 28, 1899 (p. 10).

It is evident from these documents, so far as human conviction and certainty can go, that the Government officers were well assured that Sum Jim and Chin Ying are one and the same person, and that he was justly refused readmission on his merchant claim, because he was, in fact, a laborer and laundryman in Mott street, New York. His "uncle" having testified that Chin Ying had never worked or lived in New York, became alarmed when the Mott street address was brought out, and would merely say that he did not know whether Chin Ying had lived there or had been a member of a mercantile firm, and did not know where he was in any of the years between 1895 and 1898, although he previously testified that Chin Ying had been in China ever since his departure from this country when he was 10 years of age.

Thus in both cases is the claim of citizenship by reason of birth in the United States founded upon discredited testimony, and in Chin Ying's case the supposed "native born" is shown not only to have been a laborer, but one whose admission to this country on a fraudulent merchant claim was denied.

Some Chinese were doubtless born in this country twenty to thirty years ago, but there were comparatively few Chinese women here then and very few who were wives and mothers. The growing and disproportionate number of Chinese adjudged to be native-born citizens is matter of grave concern when we con-

sider the probabilities at the period of the supposed births here, and the flippant and meretricious motives upon which the claim to citizenship is often advanced.

It is to be noticed that counsel for Chin Ying admit (p. 3) that he is a Chinese person and not a member of the exempt class, and came into the United States as charged in the complaint and warrant. This is consistent with the native-born claim, but of course not consistent with the fact that the man had claimed in 1897 and again in 1899 that he was a member of the exempt class.

ARGUMENT.

There appears to be no difficult question of jurisdiction as to this court, but the situation in that regard may be submitted. The appeals here were taken under section 13 of the act of September 13, 1888, the question of the validity of which, as dependent upon a treaty never ratified, has been or is now before the court in regard to various provisions. The United States has never strenuously resisted on the ground indicated the right of appeal by Chinamen under section 13. The language of the act is that "any such Chinese person * * * may * * * appeal to the judge of the district court for the district." No right of appeal is given to the United States and no further appeal to Chinamen. Obviously, the proceedings being civil rather than criminal in their nature, it is pertinent and fitting that the United States should have the right of appeal, especially when the grave matter of citizenship is involved.

It is assumed that the appeals herein were allowed under section 5 of the circuit court of appeals act, because the validity or construction of a treaty is drawn in question. It is not material to the present issue, but the remark may be volunteered that upon the same theory, or under some other paragraph of section 5, the United States would be entitled to take an appeal from the district court with equal right, or should be allowed an appeal with as strong an influence upon the judge's discretion. For although the United States may not be able to carry the case from the commissioner to the district court, if, on a Chinaman's appeal, the district court discharges the Chinaman, then the United States ought to be able to bring the case to this court by appeal, because of the civil nature of the questions involved and their national and international importance, and because of the scope and meaning of the fourth and fifth clauses of section 5 of the circuit court of appeals act. This suggestion seems to complete the jurisdictional situation. It must probably be admitted that such views might be urged with force upon the discretion of a court to allow an appeal, but might not fully sustain and vindicate an appeal by the United States as of right.

I.

THE ASSIGNMENTS OF ERROR.

Having lodged these cases here on the only claim which could justify the jurisdiction, namely, the construction of the treaty, counsel seek to broaden the field of review and attack the commissioner's proceedings and findings on the naked proposition that a mere

claim of citizenship ousts the commissioner's jurisdiction to find a Chinese person not entitled to remain in the United States and to deport him. There were some other formal objections, but they merit no attention. Formal defects in the proceedings do not invalidate the statute or the jurisdiction or proceedings thereunder. (*Fong Yue Ting* v. *United States*, 149 U. S., 698, 729; *Chow Loy* v. *United States*, 112 Fed. Rep., 354.) The chief error assigned is that section 3 of the act of May 5, 1892, was repealed by the treaty of 1894, and that the treaty repealed generally the provisions of law theretofore in force conferring jurisdiction over proceedings for the deportation of persons of Chinese extraction, and against Chinese persons found in the United States and charged with unlawful entry into the United States (p. 23, Rec. in No. 525; p. 19, Rec. in No. 526).

II.

THE COMMISSIONER'S JURISDICTION APART FROM THE OBJECTIONS BASED UPON THE TREATY.

a. In general.

It should not be necessary to dwell upon the proposition that the commissioner is authorized and empowered to determine the facts. It is the commissioner before whom a Chinaman must establish his right. The language of the law is (sec. 3, act of 1892) that the Chinese person shall be adjudged to be unlawfully within the United States unless he "shall establish by affirmative proof to the satisfaction of such justice, judge, or commissioner his lawful right to remain

in the United States." It may be that on the appeal to the district court a right to review the facts attaches; but certainly the well-established principle that the facts may not be reexamined in an appellate tribunal controls the appeal allowed to this court. This appeal is based upon the single and definite question of law respecting the treaty under section 5 of the circuit court of appeals act, and is restricted to the inquiry whether *ab initio*, as a question of law, the commissioner had any authority or jurisdiction at all.

The situation is analogous to *habeas corpus* proceedings, in which on original application the only question is whether the proceedings complained of were wholly void, or whether there was no legal authority for the action resulting in the petitioner's detention (*In re McKenzie*, 180 U. S., 536), and in which, on appeal, the revision in the appellate court goes to the authority of the lower tribunal and the legality of its action, but does not pass upon the facts or review the proceedings below when duly authorized. (*Benson* v. *McMahon*, 127 U. S., 457; *In re Luis Oteiza y Cortes*, 136 U. S., 330; *Nishimura Ekiu* v. *United States*, 142 U. S., 651; *In re Lennon*, 150 U. S., 393; 166 U. S., 548, and auth. cit.)

This doctrine, in the recent cases of *Carter* v. *Roberts*, 177 U. S., 496, 498; *Carter* v. *McClaughry*, 183 U. S. 365, 381, was applied with the greatest force, perhaps, because there the question was of a review and revision by a civil tribunal of proceedings of a court-martial. But the principle is a general one and, subject to well-defined restrictions, is generally appli-

cable, especially to a case in which the lower tribunal must expressly be satisfied that the right claimed is well founded.

The last case before the court in which a commissioner's jurisdiction was involved was that of *Li Sing* v. *United States* (180 U. S., 486). There the court evidently considered that the decision of the commissioner (no appeal having been taken, but *habeas corpus* being sued out) is final on the facts. In effect, the petitioner sought to have the facts reviewed, and the briefs presented and argued this very question before the court. This court left that subject with the statement that the commissioner "had authority under the statutes to hear and determine the question whether Li Sing was entitled to remain within the limits of the United States," and then proceeded to consider only the errors of law alleged to exist in the commissioner's acts.

b. On claim of citizenship.

It may be that on a claim of citizenship there is an instinctive pause, and the influence of a feeling or sentiment that that claim should be relieved from the usual rules and proceedings in Chinese cases. But citizenship is sacred from the point of view of guarding its sanctity against designing and fraudulent use, as well as when invoked as a support and shield to just rights. The claim is easily made and is notoriously now made as one of the most hopeful among the shifting devices of Chinese persons not permitted by the laws to enter the country. I know of no reason why a commissioner

should not pass upon this claim as well as upon any other claim adduced by a Chinaman in his effort to satisfy the commissioner of his right to remain here. It must always be remembered that the Chinaman must establish his right to the commissioner's satisfaction. To assert citizenship does not establish the right, and the commissioner is not required on that assertion, with the doubtful evidence accompanying it, to abdicate his reason, intelligence, and judicial judgment. I reiterate that when that claim or any other claim is made the Chinaman must establish it; the Government is not called upon to disprove it, and I can perceive no reason for the contention (made in effect) that the commissioner before such a claim must not only apply unusual scrutiny and deliberation, but must presume that the Chinaman and his witnesses are telling the truth on this particular matter.

The district court for Vermont has recently decided in four cases that, where the sworn application for a registered laborer's certificate shows that the Chinaman first landed in this country at a time later than that fixed as the date of the birth of the alleged native born, it so far impeaches the testimony of the pretended father or other witness to birth that such testimony can not be accepted as sufficient proof of nativity. Two of these cases are now pending on appeal to this court, namely, the cases of Leung Quong and Leung Ming. Judge Wheeler's opinion in those cases is as follows:

> The explicit statement of the principal witness, the uncle of appellants, of the year, month,

> day of month, and vessel of his arrival in the United States, in his application for a laborer's certificate shows, in connection with his testimony, that he came but once; that at the time of their birth he was in China, and that his knowledge of their birth, as he states it, would be of their birth in China. The testimony of the other witness, that they were born in California, although more consistent, is not sufficient to overcome this and make their citizenship clear. Deportation affirmed. (111 Fed. Rep., 1007).

The case of *Quock Ting* v. *United States* (140 U. S., 417), involving this very point, holds that "uncontradicted evidence of interested witnesses to an improbable fact does not require judgment to be rendered accordingly." The court say:

> The question presented is whether the evidence before the court below was sufficient to show that the petitioner was a citizen of the United States. The testimony given by himself amounted to very little. Indeed, it was of no force or weight whatever. The particularity and positiveness with which he stated the place of his birth in San Francisco was evidently the result of instruction for his examination on this proceeding, and not a statement of what he had learned from his parents in years past. * * * The testimony of the father was also devoid of any incident or circumstance corroborative of his statement. The production of the so-called store book * * * does not strike us as at all conclusive. * * * The alleged entry

> could as easily have been made as the manufacture of the story repeated. * * *
>
> Undoubtedly, as a general rule, positive testimony as to a particular fact uncontradicted by anyone should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions or of his own conduct as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced.

"Although the claim of one of Chinese parentage who is seeking admittance to this country that he was born here is corroborated by another Chinese witness and uncontradicted, yet their testimony may be discredited if contradictory as to other matters." (*In re Jew Wong Loy*, 91 Fed. Rep., 240; see also *Gee Fook Sing* v. *United States*, 49 Fed. Rep., 146; *United States* v. *Lee Pon*, 94 Fed. Rep., 827.)

In *In re Louie You* (97 Fed. Rep., 580) the court said:

> I am not willing to establish the precedent of admitting Chinese persons who have admittedly

> remained out of the country for so great a length of time [in this case sixteen years], unless some white witness, or some fact not depending upon Chinese testimony, corroborates the testimony of the Chinese witnesses relied upon to establish the identity of the person who seeks a landing. Those who leave the country when infants must not expect to gain ready readmission after they have, in effect, reached maturity. If satisfactory proof of their right to land is not possible in such a case, the fault is theirs. The difficulty is one easily foreseen.

These records, however, seem to me impregnable on all branches of the case. If the Government should concede (which ~~we do~~ it does not concede), or the court should hold, that the entire case may be reviewed here fundamentally and *de novo*, I think the Government contentions on the facts will stand the closest scrutiny. Can it be said with any fair degree of probability—much less certainty—that these Chinamen *have* established their claims to citizenship? Upon the facts drawn from the record, as set forth above, I do not think it is necessary to dwell any longer on this phase of the case.

c. A commissioner is a judge under these laws.

This is a proper place to refer to an objection of the appellants which seems to be without merit. Section 6 of the act of 1892, relating especially to the registration of resident laborers, unlike section 3, provides that a Chinese laborer who neglects, fails, or refuses to register within a certain time shall be taken before

a *United States judge*, and shall be ordered to be deported unless he shall establish to the satisfaction of *said judge* that he has been unable to procure his certificate, and to the satisfaction of *the court* that he was a resident of the United States at the time of the passage of this act. This section is not, indeed, essentially involved in these cases, because these men do not claim to be registered laborers. Their claim is wholly inconsistent with that status.

But it may be said in connection with the act in which the words occur, and in their relation to all of the Chinese exclusion legislation, that the words "United States judge," "said judge," and "the court," in section 6, obviously refer to the tribunal for Chinese cases composed of either a justice, a judge, or a commissioner. It does not strain the meaning of language to contend that these words in section 6 apply to both the superior judicial officers and the inferior judicial officer named in section 3. That is quite clearly the intention of the law. The collocation of the three words "justice, judge, and commissioner" is frequent throughout the acts (e. g., section 12, act of 1882; and see same section amended in the act of 1884; section 13, act of 1888, and section 3, act of 1892). Where it is plain that the judge of the district court is intended, the law uses that phrase, as in the provision for an appeal in section 13 of the act of 1888. But in section 6 of the act of 1892 and its amendment of 1893 the phrase "United States judge" is used simply to avoid the repetition of that collocation several times within the limits of one section of the law.

A United States commissioner is a quasi-judicial officer (*In re Kaine*, 14 How., 103; *United States* v. *Jones*, 134 U. S., 483; *United States* v. *Allred*, 155 U. S., 591); in colloquial use of the term he is a United States judge, and certainly under this law and in the conduct of hearings in Chinese cases his function is that of a judge or a court *pro hac vice*.

In the case of *In re Wong Fock* (81 Fed. Rep., 558) Judge Morrow held that a United States commissioner is a "United States judge" within the meaning of section 6 of the act of 1892, saying:

> Section 3 of the act is to be read in connection with section 6. Section 2 of the same act is also consistent with and fortifies the interpretation to be given to the expression "a United States judge." That Congress intended that United States commissioners should have the power to determine whether Chinese persons were lawfully within the United States, and to make the appropriate order of deportation if they were found to be within the United States in violation of section 6 of the act is, I think, patent from a reading of the act * * * in its entirety, and also from previous acts upon the subject (citing section 13, act of September 13, 1888; section 12, act of May 6, 1882, as amended by the act of 1884). The expression "A United States judge," found in section 6 of the act of May 5, 1892, is, in my opinion, a general one, and refers to those judicial officers (viz, "justice,

> judge, or commissioner") previously and specifically enumerated in sections 2 and 13 of the same act. A United States commissioner is certainly a judicial officer, and exercises, it is true, within very narrow limits, the functions of a United States judge.

Referring to the definition of United States judge in the case of Fong Yue Ting, the court said:

> While in the case above referred to the Supreme Court were considering the term "a United States judge" as applied to a district judge, still it would seem that the definition they then gave to the expression * * * in the sense in which it is used in the acts referred to is broad enough to include United States commissioners. I come to the conclusion that United States commissioners not only have the power to adjudge whether a Chinese person is unlawfully in the United States under sections 2 and 3 of the act, but that they have also the power to order a deportation under section 6.

But it is unnecessary to pursue this question, for (1) section 6 is not essentially involved in our inquiry, since the appellants concede that whatever other provisions the treaty repealed, this section is in force because of Article II of the treaty; (2) the United States judge in these cases did hear, adjudge, and order, because these cases went to him on appeal; and (3) these men are not proceeded against strictly as *non-registered* laborers.

d. The court has recently sustained the commissioner's jurisdiction.

Recurring to the Li Sing case, it is apparent, I think, that such petitioners or appellants are almost invariably reduced to abandon their efforts to insist upon a review of the facts here, and are compelled, as these appellants are compelled, to attack the validity of the laws. The court say (180 U. S., p. 492): "We do not understand it to be asserted on behalf of the petitioner that the commissioner disregarded, in any particular, the provisions of the several statutes; but it is claimed that some of those provisions are invalid, and that, therefore, the sentence of deportation should be set aside." Remembering, then, that this case arose and was decided long after the treaty of 1894 was ratified, it will be an appropriate introduction to the next portion of this brief, involving the vital question, to show just what the court held in the Li Sing case, namely, that section 3 of the act of 1892 is constitutional and valid; and that the portion of section 2 of the act of 1893, which prescribes a particular rule of evidence to establish the merchant claim, is consitutional and valid. Both of these propositions had already been settled in the case of Fong Yue Ting, as Mr. Justice Shiras, speaking for the court, points out.

It is interesting to observe as a significant feature in the present case that now again an attempt is made to overthrow section 3 of the act of 1892 on novel and, as we submit, manifestly untenable grounds.

III.

THE QUESTION AS TO REPEAL BY THE TREATY.

The treaty of 1894 (28 Stats., p. 1210), which we quote in full in an appendix, along with certain sections of the act of 1884 and of the act of 1892, has been part of the supreme law of the land for over seven years. The argument that it has in general abrogated the Chinese exclusion policy of this country and has repealed a great portion of the laws on the subject—and, in particular, all of the laws relating to deportation except those which concern registered laborers under article 2 of the treaty and section 6 of the act of 1892, with its amendment of 1893—is now brought forward as a sober proposition, meriting attention, for the first time.

a. Decisions and rulings.

I have pointed out in a related brief now before the court that the effect of the decisions in the cases of Mrs. Gue Lim (176 U. S., 459), and of Li Sing (*supra*), is necessarily fatal to the appellant's contentions. Furthermore, many cases have been decided in lower Federal courts since the ratification and promulgation of the treaty of 1894 which intimate no doubt of the entire consistency between the treaty and the statutes. (*United States* v. *Loo Way*, 68 Fed. Rep., 475; *Wong Fong* v. *United States*, 77 Fed. Rep., 168; *In re Chu Poy*, 81 Fed. Rep., 826; *United States* v. *Yong Yew*, 83 Fed. Rep., 832; *In re Li Sing*, 86 Fed. Rep., 896; *In re Jew Wong Loy*, 91 Fed. Rep., 240; *United States* v. *Chu Chee*, 93 Fed. Rep., 797.)

Some of these cases explicitly refer to and consider the treaty as consonant with and a part of this body of laws.

It is impossible to suppose that the argument now made, if possessing any merit, would not have been heretofore presented to the courts, or, indeed, have been applied to the situation by the courts on their own initiative. Again, the executive authorities have made many rulings on the subject of Chinese exclusion during the last eight years in contemplation both of the treaty of 1894 and the other laws. It has been pointed out through various rulings that in certain minor respects the treaty modified some rule or requirement founded upon the prior acts. In every such case the reason for the view that some minor change had been carried into the scheme was necessarily apparent, and no fundamental repugnancy has ever been suggested. (21 Op. Atty. Gen., 347; 22 Op., 201; T. D. 18343, 18626, 20079.)

I submit that by this uniform acceptance both by the courts and the Executive of the interdependence between the treaty and the other laws, there is established a rule of harmonious judicial construction (in effect), and of long-continued administrative construction in reality and in plain terms, which is final and controlling.

But the analysis of the treaty itself shows better than any other argument that it recognizes, carries out, and effectuates the previous laws and the scheme of exclusion; and instead of repealing, or overthrowing,

or weakening them, the treaty not only does not cut out any essential part of the prohibitions and mandates of the law, or destroy any of the jurisdiction and machinery for procedure, but simply perfects and completes the structure existing when it became law.

b. The history of the diplomacy.

It is not necessary to carry the court's attention back to the diplomatic negotiations and correspondence resulting in the treaty of 1880. These documents are to be found in Foreign Relations of the United States for 1881 (pp. 177–200); see also *United States* v. *Ah Fawn*, 57 Fed. Rep., 591. The most important and significant conclusion to be drawn from these negotiations is that the Chinese Government substantially agreed that the term "laborers" should include constructively every Chinese person applying for admission to this country who was not a member of the particularly defined and specified classes permitted to come, viz, officials, teachers, students, merchants, or travelers for pleasure or curiosity. (Article II, treaty of 1880, 22 Stats., 826; article III, treaty of 1894. See particularly pp. 188, 189, 197, Foreign Relations, U. S., 1881; *United States* v. *Ah Fawn*, *supra*, at p. 595.)

See also intimation on this point in *United States* v. *Mrs. Gue Lim*, 176 U. S., at p. 463.

The correspondence preceding the treaty of 1894 is contained in Senate Executive Document No. 54, Fifty-second Congress, second session. The burden of the Chinese complaints was that the act of October 1, 1888, under the decision of this court in the case of

Chae Chan Ping v. *United States*, 130 U. S., 581, entirely repudiated the stipulation of the treaty of 1880 (article II), that Chinese laborers should be allowed to come and go of their own free will and accord; that tens of thousands of Chinese subjects temporarily left the United States armed with the signed and sealed assurance of this Government of their right to return. It was doubtless with a view to the protest of China on this subject, as shown by the correspondence, that, while the registration and other features of the act of 1892 were adopted against the wishes of China, the provisions of article 2 of the treaty of 1894 were also adopted. After the passage of the act of 1892 the *Yamen* requested our minister—

> to memorialize the President of the United States to instruct Congress to reconsider the recent exclusion act, so that it may be in due observance of international law, and thus show a feeling of regard for the relations of the two countries (pages 28–29, Document 54, *supra*).

The correspondence shows that Congress deliberately determined by the acts of 1892 and 1893 to strengthen the restriction policies, which determination this court has said is sovereign and final; that in view of the valid reasons existing for an exception from the strictness of exclusion as to registered laborers returning from China after temporary absence—on claims recognized in the treaty of 1888 which failed, and in the act of September 13, 1888, dependent thereon—the treaty of 1894 therefore allowed and established this exception beyond question. I have discovered some

statements of the reasons why the treaty of 1888 failed of ratification. The act of 1888 which recognized that treaty was almost immediately followed by the act of October 1, 1888, which made exclusion more rigid, and was the cause of the renewed complaints from China, which suggest that we were not regarding our treaty obligations. In a note from the *Yamen* to Mr. Denby (p. 11, Document 54) appears the following statement:

> Under these circumstances, the ratification by His Excellency, the former President, on the 26th day of the eighth moon last year (western style, the 1st of October), of the statute enacted by Congress prohibiting immigration of Chinese laborers is beyond belief. Further, this *Yamen* had previously, viz, on the 15th day of the eighth moon of that year (September 19), sent a dispatch to your excellency submitting for your consideration three additional clauses to the new treaty. To this, however, your excellency has never replied. The Chinese minister to the United States also submitted these three clauses in a dispatch to the Department of State. He, too, received not a word in reply. The new treaty, however, was rejected, and a new statute was enacted in place of it.

Mr. Denby, in a note to the *Yamen* (p. 30, same document), says:

> It does not come within the purview of the diplomatic officer to discuss the intrinsic merits or demerits of the laws of his country. I beg to remark, however, that if the treaty of

1888 had been approved by the Government of China the questions now mooted would not have arisen. China at that time seemed to fear that if that treaty were approved similar treaties would have to be conceded to other powers. She preferred that her people should be prevented from going to the United States by an act of Congress which she might designate as anti-treaty legislation to their being excluded from other parts of the world by her own consent. The danger of this policy was pointed out by me at the time, and events have justified my remonstrance.

Another reference to this subject is found in a note of Mr. Wharton, the Acting Secretary of State, as follows, referring to the statute of October 1, 1888:

> That statute was brought about by the regrettable failure to complete the treaty signed at Washington March 12, 1888. It does not seem necessary at this late date to discuss the circumstances under which the treaty of 1888 failed, or to conjecture whether, had it been duly perfected, it would have served to avert the difficulties or meet the issues which have since arisen. That the failure of that treaty, through the withholdment of the imperial ratification, exerted a prejudicial influence upon American sentiment thereafter is hardly open to doubt. * * *
>
> As you say in your note of the 7th November: "It is conceded that the Imperial Government has not encouraged the emigration of its people from China to the United States, but, on the

contrary, in the negotiations between the countries on the subject, it has, in the most friendly manner, yielded to the suspension of emigration." It is, perhaps, unfortunate that the tangible expression of this friendly disposition went no further than the negotiations which preceded the collapse of the treaty signed in 1888. I see no reason why a better understanding may not be brought about whereby the position of China shall be rather one of amicable concurrence toward a rational and practical end than one of obstruction to the working of measures the adoption of which has been in a large degree forced upon the legislative power of the United States by the conduct of the Chinese people in this country and by the attitude of the Imperial Government in their regard. (Id., pp. 41, 43.)

This correspondence shows that the Chinese authorities, and not the Government of the United States, were responsible for the failure of the treaty of 1888. A copy of that treaty, as signed by the President, is given in the appendix. It will be observed that it is almost identical with the treaty of 1894.

Thus, it is clear, I think, that the treaty of 1894 was the fruit of negotiations in which the Chinese Government was seeking to obtain a more liberal construction of the privileges which might be accorded Chinese in this country consistently with the exclusion policy; and, after objection to the abortive treaty because they could not obtain more, or because it interfered with their relations with other countries, they concluded

that the modifications of the law finally accorded were desirable.

There is more to be said on this subject. The Chinese minister wrote to Mr. Gresham as follows, November 8, 1893 (Foreign Relations, 1893, p. 263):

> I have the honor to state that I have received information of the passage by the Congress of the United States of an act to amend an act [act of May 5, 1892] entitled "An act to prohibit the coming of Chinese persons into the United States," and I express my thanks for the provision in the bill which stops the proceedings in the prosecution of Chinese persons under the Geary law in the courts and as a result releases them from imprisonment. * * * In view of all the facts, I would respectfully inquire whether it is now the intention of the United States Government to permit these most serious questions to rest as a finality upon the legislation of Congress as it now exists, or whether the thought is entertained of further negotiation through a different source to the end that all the existing difficulties between such nations may be permanently settled, and their honor, dignity, and friendship maintained and preserved? If the Government of the United States desires to entertain and consider any negotiation whatever that may lead to an adjustment of the questions involved, I will willingly join in an interview upon that subject.

This letter fully recognizes (as, indeed, was unavoidable) the power of Congress to enact the Geary law and the amendment thereto, "notwithstanding their

harsh provisions" and the impossibility of the repeal of the Geary law and of any great modification of the existing exclusion enactments, as the minister and the home Government of China had repeatedly been advised by the State Department and our diplomatic authorities. This note seems to have been the first definite proposal concerning the treaty of 1894.

After the treaty was signed by the Secretary of State and the minister of China, the minister wrote a letter to Mr. Gresham, asking that a certain ruling against the return of Chinese merchants should be modified, but plainly showing that China had no idea and made no contention that the acts of 1892 and 1893 were not in force. (Foreign Relations, 1894, p. 166.)

Mr. Gresham, in transmitting a copy of the convention to our chargé d'affaires in China (id., p. 176), says that upon ratification the chargé is "to bring the treaty to the knowledge of citizens of the United States in China, * * * inviting attention to the reciprocal provisions of Article VI concerning registration, and advising all American citizens in China, being laborers, * * * of their obligation to conform to such laws or regulations as the Government of China may enact, similar to the registration act of May 5, 1892, for the registration of such American laborers in China."

The particular correspondence for 1893 and 1894, which brings the negotiations up to the execution and ratification of the treaty, is not published. The failure to publish appears to have been merely inadvertent.

The following is an abstract taken from the files of the State Department:

Mr. Denby, on May 27, 1893, advised the Secretary of State of a communication from the Chinese foreign office to him (inclosing a copy), and, referring to the act of 1892, shows the lack of comprehension of the state of the case by the Chinese authorities in the following sentence: "The substance of this communication is that the *Yamen* desires you to direct the Supreme Court to declare the act unconstitutional."

In a report of an interview between Li Hung Chang and Consul Bowman, contained in a dispatch from Mr. Denby, dated July 7, 1893, Li Hung Chang requested the consul to "inform President Cleveland * * * that if the next Congress decides to enforce the existing law, China will at once retaliate, friendly relations between the countries will be broken off, and laws will be enacted looking to the expulsion of Americans from China." Congress did, however, enforce the existing law by the amendment of November 3, 1893, and China did not retaliate, but proceeded, with a recognition of the laws, to negotiate the treaty.

In a letter to the Secretary of State, dated December 26, 1893, the Chinese minister says:

> According to the reply quoted above, it would appear that the Chinese Government acquiesce to the two propositions of the honorable Secretary, namely, the prohibition of emigration by China and the compliance with the registration laws by her people in this country. The

> Imperial Government, however, desires that steps be taken first to conclude an international agreement. I find that the unratified draft of the convention agreed upon between my predecessor, the late Minister Chang, and one of your honorable predecessors, to be in the main a satisfactory one; but as the aspects of the question under consideration have undergone some change with the lapse of time, it is proposed to adopt it as a basis for negotiation, with a few alterations, as enumerated hereinafter. * * * As the Imperial Government desires to make the convention before the enforcement of the registration laws, it is proposed that if the six months' extension of time, within which registration is to be effected, should expire before the draft of the proposed convention is decided upon, the time be further extended so that no action may be taken to prosecute, imprison, or ill-treat the Chinese.

On January 11, 1894, the minister addressed a note to the Secretary of State inclosing a draft of the proposed treaty between the United States and China, which is given in the appendix to this brief. It will be seen by examining this draft that the very question of the "annulment * * * of all the legislative measures enacted in and since the year 1888 affecting the coming of Chinese subjects to the territory of the United States and their residence therein" was brought forward by China and ultimately rejected by the

United States. In Mr. Gresham's reply, dated January 5, 1894, to the note of December 26, he says:

> * * * In 1886 our minister at Pekin received from the Chinese foreign office a communication announcing that the Emperor of his own accord proposed to prohibit Chinese laborers, under severe penalties, from coming to the United States and from returning to this country after having gone back to China, in order that that class of laborers here might be reduced in number; that the proposed treaty of 1888, which was in harmony with these views, was concluded by the plenipotentiaries of the United States and China to the expressed satisfaction of the latter, and ratified by the Senate with a slight amendment, which the Chinese minister in a note to the Secretary of State remarked did not alter the terms of the treaty; that the subsequent legislation of the United States was in part the result of the failure of the Government of China to exchange ratifications of this treaty. * * *
>
> I now beg to repeat that, pending the negotiation of a treaty, Chinese laborers who desire to remain in this country should not omit compliance with the requirements of this law in expectation of its repeal or further extension by Congress.
>
> Earnestly desiring to strengthen the friendship which has so long existed between the United States and China, and to promote the highest good of the people of both countries, I am

> ready to continue negotiations with you for a convention on the basis of the draft treaty of 1888.

In reply to the note of January 11, Mr. Gresham said (January 29, 1894):

> There are certain recitals and provisions on the draft submitted which this Government desires should be eliminated and other provisions inserted, but I am persuaded from the sentiments expressed by you at our two recent interviews that a convention can in due time be agreed upon, which will be satisfactory to both Governments.

In an amended draft of the treaty submitted by the minister in a note of February 19, 1894, he adds a paragraph, to which in an interview Mr. Gresham had expressed some objection, at the end of Article II, by which Article I was declared not to apply to Chinese laborers who had returned to China from the United States previous to the act of October 1, 1888, possessing certificates of identity under the act of 1884. But the Secretary continued to object to such a provision (note of February 20, 1894), thought that there were very few, if any, Chinamen then in China of the class described, and feared the adoption of the proposed amendment would be objected to by the Senate as opening a door to fraud.

The fact that in the draft proposed by China for the convention of 1894 their utmost demand was that the legislation enacted in and since the year 1888 should be annulled shows very clearly that they accepted the

previous legislation of 1882 and 1884, and their demand respecting later legislation was not granted, as we see from the negotiations and the text of the treaty as adopted.

It is evident that the main object which China was seeking in the negotiations was the repeal or suspension of the registration law (in which she did not succeed), and the abrogation of the act of October 1, 1888, as to Chinese laborers who had departed from this country theretofore possessing certificates of identity under the law of 1884. In this also she did not succeed, for the United States maintained the position that the laborers' right to return should be restricted to registered laborers possessing the qualifications shown in Article II of the treaty.

There can not be any reasonable doubt from the foregoing *résumé* of the treaty of 1894 that the Chinese Government thereby assented to the general plan of exclusion, however protesting their attitude had been toward the strictness of some details, the rigor of enforcement, and the asserted failure of this Government to regard conscientiously the stipulations of the prior treaty. In the end, the recognition of the scheme was relatively cordial, the acceptance of existing laws explicit, and, in fine, while China sought then, as she has always sought, complete freedom of access for her people to the United States, she was satisfied with what she obtained. The imperial ratification of the treaty, as well as the previous negotiations, establishes

this fact. It is difficult to perceive why she should not have been satisfied, since she has never been willing in the past, and doubtless is not willing to-day, to give us any fair correlative degree of the same rights and privileges in China.

Whatever the professions and stipulations of the treaties, there is no real mutuality, and in practice the restrictions against our citizens in China are far greater than our own restrictions against subjects of China. Note, for example, the "serious and useless obstruction to the free travel for which the treaties with China provide," on the familiar grounds of the inability of local authorities to afford timely protection, the bad populace prejudiced against foreigners, requiring the repeated production of passports in person to local authorities, etc. See letters of the *Yamen* to Mr. Denby of December 15, 1893, and Mr. Denby's reply of December 30 (Foreign Relations, 1894, pp. 154–157); see, also, the entire section "China," in Foreign Relations for 1895, Part I, regarding the organized, extensive, and long-continued anti-foreign riots occurring in the province of Szechuan. Page 91 contains a reference to the British consul's statement that there was "complicity" on the part of the officials; and pages 171–173 show that this consul also reported that "the deplorable weakness and duplicity of the local authorities were the indirect cause of the massacre," and the complicity of the troops frequently appears in the various accounts of many acts of violence and slaughter which were perpetrated.

c. An analysis of the language of the treaty.

This, then, being an outline of the diplomacy, let us examine the treaty itself. After the preamble of the proclamation, there is a recital of the treaty of 1880, of the desire on the part of the Chinese Government, in view of the antagonism and disorder caused by the presence of Chinese laborers in certain parts of the United States, to prohibit such emigration from China. There is a recital of the desire of the two Governments to cooperate in prohibiting such immigration, to strengthen the mutual bonds of friendship, and to adopt reciprocal measures for the protection of their citizens and subjects. Article I agrees that for ten years the *coming of laborers* to the United States shall be *absolutely prohibited* except as allowed by Article II. Article II gives a limited right of return to registered laborers having the specified family or property qualifications. Article III leaves the right of the permitted classes as it was before, except that the certificate provided for by section 6 of the act of 1884 may be from the Government of China or the Government where the applicant last resided.

This has been construed to mean that Chinese subjects of the permitted classes coming into the United States from China must produce the certificate of the Government of China, and coming from other foreign countries, in which they are residents, must produce the certificate of the government of such countries. (21 Op., 347; 22 Op., 201.) Chinese laborers shall continue to enjoy the privilege of transit, subject to

regulations to prevent the privilege from being abused. Article IV assures to Chinese in the United States the protection of persons and property accorded the most-favored nation. Article V provides that—

> The Government of the United States having by an act of the Congress, approved May 5, 1892, as amended by an act approved November 3, 1893, required all Chinese laborers lawfully within the limits of the United States before the passage of the first-named act to be registered as in said acts provided, with a view of affording them better protection, *the Chinese Government will not object to the enforcement of such acts*, and reciprocally the Government of the United States recognizes the right of the Government of China to enact and enforce similar laws or regulations for the registration, free of charge, of all laborers, skilled or unskilled (not merchants as defined by said acts of Congress), citizens of the United States in China, whether residing within or without the treaty ports.

And the United States agrees to furnish to China a list of its citizens residing in China.

Article VI continues the convention for a period of ten years, and provides for renewal for a like period if formal notice of termination is not duly given before the first ten years expire.

It seems supererogation to argue that this treaty explicitly recognized the scheme of exclusion and the acts of 1892 and 1893, and by consequence, and in view of section 1 of the act of 1892, all the existing Chinese exclusion laws. This recognition and these express

provisions are patent on the face of the treaty. No intention whatever is remotely suggested that either party to this contract had in mind any other material modification or disturbance of existing law than the allowance of a limited right of return to registered laborers. The unratified treaty of 1888 is substantially the same as the treaty of 1894. The return privilege of registered laborers was the striking feature of both treaties, and the act of September 13, 1888, was passed "to prohibit the coming of Chinese laborers to the United States," and yet was a law which especially contemplated the then pending treaty and was in certain respects, at least, dependent upon it.

It is certainly an astonishing claim that a treaty of practically the same form and purport has the effect of demolishing all the laws, when this treaty (of 1888), after signature and on the eve of a ratification which finally failed because of the Imperial refusal to ratify, called forth a law which recognized and carried it into effect, which renewed and strengthened the exclusion policy, and at the same time regarded and protected the rights of Chinese persons. This act, in part at least, may still be valid law, notwithstanding the failure of that treaty; the later acts of 1892 and 1893, recognizing and continuing all previous laws, add certain new provisions including the registration of laborers. It is on this registration, so built in with the entire framework of the statutes, that the concession of Article II of the treaty of 1894 is founded.

The truth of the matter is that Congress has developed in successive acts a plain and consistent body of legislation, making certain modifications from time to time, now by way of concession and liberality, now by way of increased stringency—so as to make exclusion or expulsion more rigorous and to prevent frauds and abuses, while regarding the rights of Chinamen permitted to enter this country and remain. Academic argument is always possible as to this or that feature of the programme, but such argument invariably runs back to the unjust and inequitable character of this policy, and the last reply to that suggestion is to be found in the closing paragraph of the opinion in the Li Sing case, *supra*. No one can doubt what in the main the law is and means, or that substantially in its general denouncements and sanctions it is the same under and since the treaty of 1894 as it was before.

This court has decided and affirmed and reaffirmed the propositions for which the Government is contending in this case, based upon the very same sections of the statutes now involved. I think the situation justifies the remark that however sincere and earnest counsel may be, this notion about the treaty is a mere phantom and is in effect a pretext to bring the same old series of propositions again before the court.

The true view of the treaty of 1894 is that by its negotiation and ratification China acquiesced in the "amicable concurrence toward a rational and practical end," which Mr. Wharton, *supra*, advocated, instead of "obstruction to the working of measures the adoption

of which has been in a large degree forced upon the legislative power of the United States by the conduct of the Chinese people in this country and by the attitude of the Imperial Government in their regard."

IV.

PRINCIPLES AFFECTING REPEALS BY IMPLICATION.

It will suffice to state in brief form the established doctrines upon repeals. Of course there is no express repeal here. In order that a later law shall work a repeal of an earlier one, there must be some manifest repugnancy, the effort of the law being always to reconcile the two acts and give effect to both, if possible. Even a recital in a statute that a former statute was or was not repealed is not conclusive as to such repeal. Whether a statute was so repealed is a judicial, not a legislative question. In affirmative statutes, such parts of the prior as may be incorporated in the subsequent statute, as consistent with it, must be considered in force. Repeals of statutes by implication are not favored and are never admitted where the former can stand with the new act, but only where there is positive repugnancy between the statutes, or the latter is plainly intended as a substitute for the former. Where two acts are not in express terms repugnant, the latter act must cover the whole subject of the former to operate as a repeal; and to have this effect, a later statute, not being repugnant in all of its provisions to a prior one, must clearly intend to prescribe the only rule which shall govern. An implied repeal only goes so far as the repugnancy extends.

A treaty dealing with a subject covered by particular laws may be regarded as analogous to a general act in its effect on such previous laws, and there the rule is that a general act is not to be construed to repeal a particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together. Here the express reference to the previous legislation recognizes and incorporates it. It may be said that an implied repeal of a law by a treaty is less likely, and should appear more clearly, than the repeal of one act by another. As a rule treaties are not meant to operate upon our municipal laws, and the effect of a treaty as carrying a repeal is for that reason to be scrutinized with particular care. The intention of a treaty, in the vast majority of cases, is to deal only with our foreign relations, and to affect our internal situation in a limited way, as matter of comity and reciprocation on behalf of the subjects or citizens of a foreign power. In the particular case of China, there can be no doubt that the later treaties sought restriction, and the other laws carried that policy further, and this gives rise to a strong presumption against any such repeal.

And it seems apparent from the decisions of the court that there is a certain hesitation about giving to a treaty the effect of a repeal, even where the language is explicit to that effect. This was the case as to the decision of the court on the Jay treaty with England, by which it was determined, only after most careful

deliberation, that the clear language of the treaty had the effect of displacing or abrogating certain State laws confiscating debts due to aliens. (*Ware* v. *Hylton*, 3 Dall., 199.)

The gist of that case is that a "treaty can totally annihilate any part of the constitution of any of the individual States as contrary to the treaty," and can repeal or nullify any State law. (See also *Hauenstein* v. *Lynham*, 100 U. S., 483, 489.) Now, the treaty was clear, the result under its language irresistible, and the laws affected were the laws of a State and not of the United States. The solemnity with which the question, presenting in certain aspects no more startling conceptions than the claim of implied repeal of Federal laws by a later treaty, was regarded by the court, is shown all through the opinions. For instance, Mr. Justice Iredell says, "In delivering my opinion on this important case, I feel myself deeply affected by the awful situation in which I stand." The court, thus, while reaching a substantially unanimous judgment, plainly hesitates before a question, not only novel, but grave from all points of view. And yet there the repeal was express and the laws affected were State laws, which are subordinate, of course, where they conflict with the national authority in the international field.

While a treaty is part of the supreme law of the land, it is a convention, a contract in a special field of sovereign activities, rather than legislation. This dis-

tinction seems to lie at the bottom of the doubt expressed throughout our judicial and legislative history, whether enabling legislation is not always necessary to effectuate a treaty. To a limited extent that doubt has been set at rest where the stipulations are clear and do not require, for instance, appropriation by Congress. *A fortiori*, it seems to me, the special, technical effect, by way of implied repeal, of one statute—that is, one act of legislation upon another—ought not to be carried over to the domain of treaties, unless the purpose is beyond question. A later treaty may doubtless abrogate a treaty, as a later statute may repeal a statute, but the result in the case of successive treaties is rather because the contracting parties have changed their agreement than because the lawgiver has issued a fiat.

It is true that the power to repeal a treaty by a later statute has been sustained as a sovereign right, subject to international reclamation, just as the sovereign may declare a treaty abrogated by reason of the derelictions of the other power. But as to the reverse case—the repeal of a statute by a later treaty—it seems to me the mind instinctively approaches such a claim with grave doubt and caution. That result could not be sustained, at least, where there was serious question; that effect should require, if possible, stronger reasons and clearer certainty than repeal of statute by statute or treaty by statute. It is well recognized, of course, that this is delicate and doubtful ground, involving the power of Congress as

contrasted with the power of the Executive upon the Senate's ratification, and the judicial function of construction of both powers.

In short, if there is doubt whether various clear undertakings of treaties (not only for payment of money) may not be ineffective without affirmative and enabling legislation, much more appropriate is it to doubt whether a mere negative effect of a treaty—a repeal, by implication, of an entire series of laws—is possible without confirmation and recognition by a statute. This idea, I submit, would be persuasive where a treaty's implication of repeal might be clear and strong; it is irresistible where such implication is doubtful, and in this case so doubtful that on any test the repeal is a figment of the imagination.

Mr. Justice Story has said that—

> Though the power to make treaties is thus general and unrestricted, it is not to be so construed as to destroy the fundamental laws of the State. A power given by the Constitution can not be construed to authorize the destruction of other powers given in the same instrument. (2 Story Const., 4th ed., sec. 1508.)

It is no unwarranted inference from that statement to say that for a treaty to overthrow laws upon a bare implication would be to destroy the fundamental law ascribing to the deliberate and reiterated intention of Congress to exclude and expel aliens the effect of a final mandate of sovereignty. But the utmost contention of the distinguished men who argued that acts of

Congress are not necessary to the validity of a treaty relied upon the express terms of the treaty and contemplated no vague and shadowy implications. (Mr. Calhoun and Mr. Pinkney in the House, as quoted by Senator Cullom, of Illinois, January 29, 1902; Congressional Record, Fifty-seventh Congress, first session, p. 1108.) Mr. Calhoun says, referring to the treaty of 1816 with Great Britain:

> It does not itself stipulate that a law should be passed to repeal the duties proposed to be repealed by this bill, which would be its proper form if in the opinion of the negotiators a law was necessary, but *it stipulates in positive terms for their repeal without consulting or regarding us.* (See also Annals of Congress, 14th Cong., 1st sess., p. 563.)

In *Foster* v. *Neilson* (2 Pet., 314, 315), Chief Justice Marshall, construing an article of the treaty of 1818 with Spain, ceding Florida, which read that "all grants of land * * * shall be ratified and confirmed by the persons in possession," etc., said that—

> The treaty is consequently to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department, and the legislature must execute the contract before it can become a rule for the court.

On the translation of the treaty then before the court the chief justice evidently thought that the words "shall be ratified and confirmed" did import a contract and require an act of Congress; but when the same treaty was considered again in 7 Pet., 53, and the proper translation appeared to be "all grants of land shall *remain* ratified and confirmed," it was held that these words acted directly on the subject and needed no legislative sanction. All these doctrines respecting the affirmative or negative effect of a treaty are based upon clear and express stipulations. Certainly an implied repeal by a treaty must be evident and necessary.

The principles stated or suggested as to implied repeals are in the main not to be doubted, and do not require citation of authorities. This court has again and again announced the rules in language which I have substantially quoted. In this case the historic doubts as to repeal shown to have attached to treaties clearly intending that effect would be misplaced, for it seems to me a manifest perversion of legal argument to contend that the treaty of 1894 in any manner suggests a repeal. There is not only no express repeal, but no implied repeal—no apparent intention of repeal. On the contrary, the language of the treaty itself shows a recognition and acceptance by both contracting powers of the existing laws. The treaty is a contract, and it must be construed in that light and in the light of the negotiations and all the surrounding circumstances. After all the changes of ingenuity have been

rung upon the matter it is clearly impossible for counsel to wrest the language of the treaty into a repeal. The case is very clear when tested by the history of Chinese exclusion, the course of diplomacy, and the particular negotiations preceding this treaty—by the terms used and the intention of this Government at all times in pursuance of the well-known policy of Congress. There can not be any valid doubt that the treaty means legally what it says and what the Government contends it means, and that it has no effect as it has no purpose of repeal.

V.

THE BRIEFS IN OPPOSITION.

I submit some comments on the learned counsel's briefs. I risk the assertion that he has found it difficult to convince himself. I do not doubt that ultimately he has done so; at least he thinks the venture hopeful. But in reality he has set himself a hopeless task. Let one or two examples suffice as an illustration of his fallacies. On the second page of his Lee Yen Tai brief he cites the case of Mrs. Gue Lim in support of an intimation that Lee Yen Tai, being a member of the privileged classes, was not required to produce the usual certificate to establish his mercantile status. Now we know from Lau Ow Bew's case that a merchant returning to his domicile here does not need to produce that certificate, but it seems that now (since August 28, 1894), if he is excluded at the port or frontier this court will not interfere even if he claims the

right to return under some act or treaty, that is, whatever the ground of the executive refusal. (Lem Moon Sing's case.)

Mrs. Gue Lim's case merely decided that the valid wife of a duly domiciled merchant, who enters the country with or after her husband, does not require a certificate. None of the cases intimates that a Chinaman, claiming to be a merchant, who has passed the frontier clandestinely, without producing a certificate and without conforming to the act of 1893 as to the proof of merchant character, who offers no evidence at all that he is a domiciled merchant returning, or even a merchant (by reason of his status in China) entering for the first time—I say, none of the cases intimates that such a Chinese person is entitled to come in without the certificate of the act of 1884, and then to remain. This is the necessary though unconscious effect of counsel's argument and it reveals two mistaken notions at least.

The first is a return to the idea that if the Chinaman is "entitled of right under some law or treaty," then he ought to be allowed to enter and remain, notwithstanding defects in his own methods or formal papers and exclusion or expulsion by the respective officers of the law. This idea, so far as regards resistance to the executive jurisdiction at the frontier, was demolished by the Lem Moon Sing decision, and counsel makes some *pro forma* concession to that effect; but now, the Chinaman having evaded and defied this jurisdiction and gotten into the country, since he can

not be sent back to the finality of the administrative decision at the port of entry which he has ignored, he immediately sets up the same plea in the new judicial jurisdiction: "I am entitled of right to enter and remain: this jurisdiction, at least, is not expressly final. I want to go into the courts and all the way through the courts." This idea, if sustained, will certainly bring into the courts—not only the district court, but the circuit court of appeals, and ultimately this court—pretty much all Chinese cases which arise, as surely as the court foresaw would be the case in the situation of Lem Moon Sing.

Again, the authority to expel subject to only one appeal is quite as necessary, and while not as explicit is about as clearly intended as the final executive authority to exclude. To hold otherwise and sustain these numerous and increasing appeals would simply put a premium on the deliberate smuggling across the frontier in order to get away from the immigration authorities. The rules of the frontier decision (based upon the law; e. g., section 2 act of 1893) are strict; there are more chances that the claims of fraud and effrontery will get through the commissioners' court if the law is violated and the boundary passed by night at some lonely point. For there can be no doubt that the law intends and requires that *all* Chinese persons seeking to enter the country shall present themselves to the officers at the ports of entry. This notion, then, is the second mistaken notion to which I referred above, viz, that although such

Chinamen break the law when they enter the country, once in they may snap their fingers with impunity at all the laws. Certainly the policy of the law (in the judicial sense) on high and righteous grounds would frown at this.

The opposing briefs seek to avoid the effects of later statutes, annual appropriation acts for the enforcement of Chinese exclusions laws since 1894 (e. g., act of June 11, 1896; 29 Stat., 413, 431), etc. (the act of March 31, 1901; 31 Stat., 1093), on the ground that "the subsequent legislation of Congress does not evince any intent to continue judicial proceedings for unlawful entry."

It seems to me that one question overthrows this entire contention, viz, can it be maintained for a moment that Congress supposed that by these acts it was enforcing and effectuating not the Chinese exclusion laws but the treaty of 1894—enforcing exclusion but not expulsion?

The cases of *Todd* v. *United States* (158 U. S., 278) and *Rice* v. *Ames* (180 U. S., 371) merely hold that a United States commissioner is not a judge in the constitutional sense. The Government does not contend that commissioners are judges in the constitutional sense, but that in the meaning and intention of these laws "United States judge" covers such judicial officers. Counsel cites Treasury Decisions of February 7, 1899, and April 14, 1899, as holding that commissioners have no jurisdiction in non-registration cases. I

am unable to find these decisions, or any other rulings of the Treasury Department holding to that effect. Such statements are doubtless unintentional errors.

Counsel thinks that the burden of proof provision is abrogated by Article IV of the treaty extending to Chinese persons all of the most favored nation's rights except the right to become naturalized citizens. The authorities do not permit such treaty stipulations to overthrow positive law or to carry more than a general assurance of fair dealing and security from violence under the law. (*In re Parrott*, 1 Fed. Rep., 481; *In re Quong Woo*, 13 Fed. Rep., 229.) The favored nation privileges are only such as are gratuitous. Little is to be inferred from them. Special engagements, as, for instance, of extradition, stand in each case on particular stipulations of the treaty. (Whart. Int. Law Dig., Vol. II, sec. 134; Lawrence's Wheat., 493; Opinion of Mr. Cushing, 6 Op. A. G., 148.) Such clauses most frequently refer to commercial reciprocity, and even in that particular complete equality is difficult to obtain under such clauses. (Calvo, Le Droit International, Paris, 1896, Tome III, sec. 1597, pp. 365–366.)

There is nothing in the case of *Yick Wo* v. *Hopkins* (118 U. S., 356) militating against these contentions, because there, though the law itself was "fair on its face and impartial in appearance," yet it was "applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances."

The recent decision in *Tucker* v. *Alexandroff* (Jan. 6, 1902) contains nothing in support of counsel's argument. The decision of the court there in reference to an ordinary stipulation of treaties, which is peculiarly mutual, held that the particular convention with Russia, being operative upon both powers and intended for their mutual protection, should be interpreted in a spirit of *uberrima fides* so as to carry out its manifest purpose. The court quoted Chancellor Kent's remark to the effect that treaties ought to receive a fair interpretation according to the intention of the parties and are to be kept with scrupulous good faith; that they are to be interpreted by the same rules of construction and course of reasoning applied to private contracts. No one doubts these principles, and they do not affect or interfere with the Government's position in these cases.

Recurring again to the argument, which I find it difficult to apprehend fully, that jurisdiction over non-registration cases is limited to United States judges by the terms of section 6 of the act of 1892, I have endeavored to show above that even if these cases should be considered non-registration cases (because the Government, it is true, might undertake to deport any Chinese laborer as non-registered, even if he did not enter until after the time for registration had expired) the jurisdiction of the commissioner is not to be doubted, and has constantly been exercised. Counsel, conceding that Lee Yen Tai's case was not founded on non-registration, because he entered for the first time in

1900, evidently considers, having to his own satisfaction gotten rid of the other grounds of the commissioner's jurisdiction, that he has driven the Government to its last defenses since the court in Fong Yue Ting's case, held that the registration law was a distinct, severable element of Chinese exclusion. I confess I can not perceive the precise bearing and issue of this argument; but at all events it is quite clear that it rests upon erroneous premises. These men are laborers, forbidden to come here by the treaty and other laws, whether ever here before or not, and section 12 of the act of 1884 and section 3 of the act of 1892 provide for their deportation.

When the Government argued that it is difficult to detect conflict between the treaty and the laws, and that no positive repugnancy could be found, it never meant to say, and did not say, that in certain perfectly obvious details the treaty has not slightly modified the laws. The Government merely says that the treaty has not wiped out the laws, nor greatly modified any material portion of them. Nor has the treaty of 1894 been such a substitution for the treaty of 1880 that the earlier treaty is repealed. All the laws and treaties stand together, and each bears a part in the aggregate entity, acting and reacting on each other in various ways, qualifying and modifying but not destroying each other.

When the Attorney-General, in 21 Op., 347, construing the supposed permissive character of article 3

of the treaty and holding that the certificate of the act of 1884 *must* now come from the proper governmental source, said that the treaty "requires nothing more than that," he said as plainly as language could say that the law required nothing more than a certificate from the government of the country where the applicant last resided; that it did not also require a certificate from the Government of China, and its requirement would not be satisfied by the latter certificate unless the applicant came from China. However, counsel goes somewhat further, and after first claiming that the certificate provision is now optional or permissive, but not mandatory, proceeds to concede that the provision is directory, but does not provide any penalty or any procedure for deportation, granting that the direction applies to the administrative officers and procedure. When this leads him to present to the court the statement that consequently it is plain that the two Governments were willing to rely upon this administrative system for enforcing the laws, and deliberately provided no procedure for deportation, it is labor lost to follow him. I do not think it is necessary to do more than place these sophistries before the court.

In the passage quoted from the opinion of Justice Story, speaking for the court in the *Amiable Isabella* (6 Wheat., 1), the learned justice declines, for the court, to annex a form to the treaty which had been omitted from that instrument. There was no statute involved; the proposition was that the court would

not supply such a deficiency and give effect to it, just because the treaty undertook to prescribe the form and failed to do so. That case has no bearing whatever on the present situation, nor has the case of *Geofroy* v. *Riggs* (133 U. S., 258, 271), holding that where a treaty *admits* of two constructions, one restrictive of rights and the other favorable to them, the latter is to be preferred. There is one possible construction of which this treaty admits, and that is the continued restriction manifest on its face. The reference to the *Amiable Isabella* case shows that counsel, starting with a claim that the treaty of 1894 repeals the legislation, is disposed to go to extreme lengths and assert that the legislation, to have any validity at all, must be expressly recognized by and incorporated in the treaty. That is to say, he passes on from the contention that an implied and doubtful negative effect of a treaty is to be recognized, to the contention that unless it positively and affirmatively recognizes previous laws they are nonexistent. It is difficult to deduce any other idea from his citation of the case of the *Amiable Isabella.*

Article III of the treaty of 1894 declares that the provisions of the convention "shall not affect *the right at present enjoyed* of Chinese subjects being officials," etc. The right was enjoyed under the treaty of 1880, under the act of 1882, which was passed to execute the stipulations of that treaty, and under the other intervening acts, which not only imposed but also regulated restriction, which not only prohibited entry

in certain cases, but guarded the right of entry in others. Article III recognizes all the legislation, unless we are prepared to say that by recognizing the allowances it intends to repudiate the prohibitions.

Article VI of the first draft proposed by China for the treaty of 1894 recites that China "has given her acquiescence to the recent legislation of the United States aforesaid." This not only means that she assented to the registration features of the acts of 1892 and 1893, but also means that she assented to the entire provisions of those acts. There is no demur based upon a distinction between different portions as separable. And the act of 1892 on its face continued in force all existing laws. Not only so, but, apart from this latter feature, the acquiescence and assent of China thus shown irresistibly infer an acceptance of legislation prior to 1892, saving only the act of October 1, 1888, which in the negotiations initiated by the treaty draft of 1894 she was seeking to abrogate in part, but, as it turned out, unsuccessfully.

What shall be said of the last clause of article III of the treaty, agreeing that Chinese laborers shall *continue* to enjoy the privilege of transit subject to regulations necessary to prevent abuse thereof? There was no allowance of transit in the treaty of 1880 nor in the intervening laws. The question of the transit privilege is now before the court, and the argument showed conclusively, I think, that there was grave doubt whether any such privilege existed under the

law; that this doubt was the subject of earnest complaint by China from 1880 on; that under the authority to prescribe regulations exercised by the Executive and recognized by the treaty as continuing, the allowance had been made in favor of Chinamen and obvious abuses had been defeated. This clause of article III is therefore strong evidence that the treaty recognized and assented to the entire scheme of laws existing in 1894.

VI.

CONCLUSION.

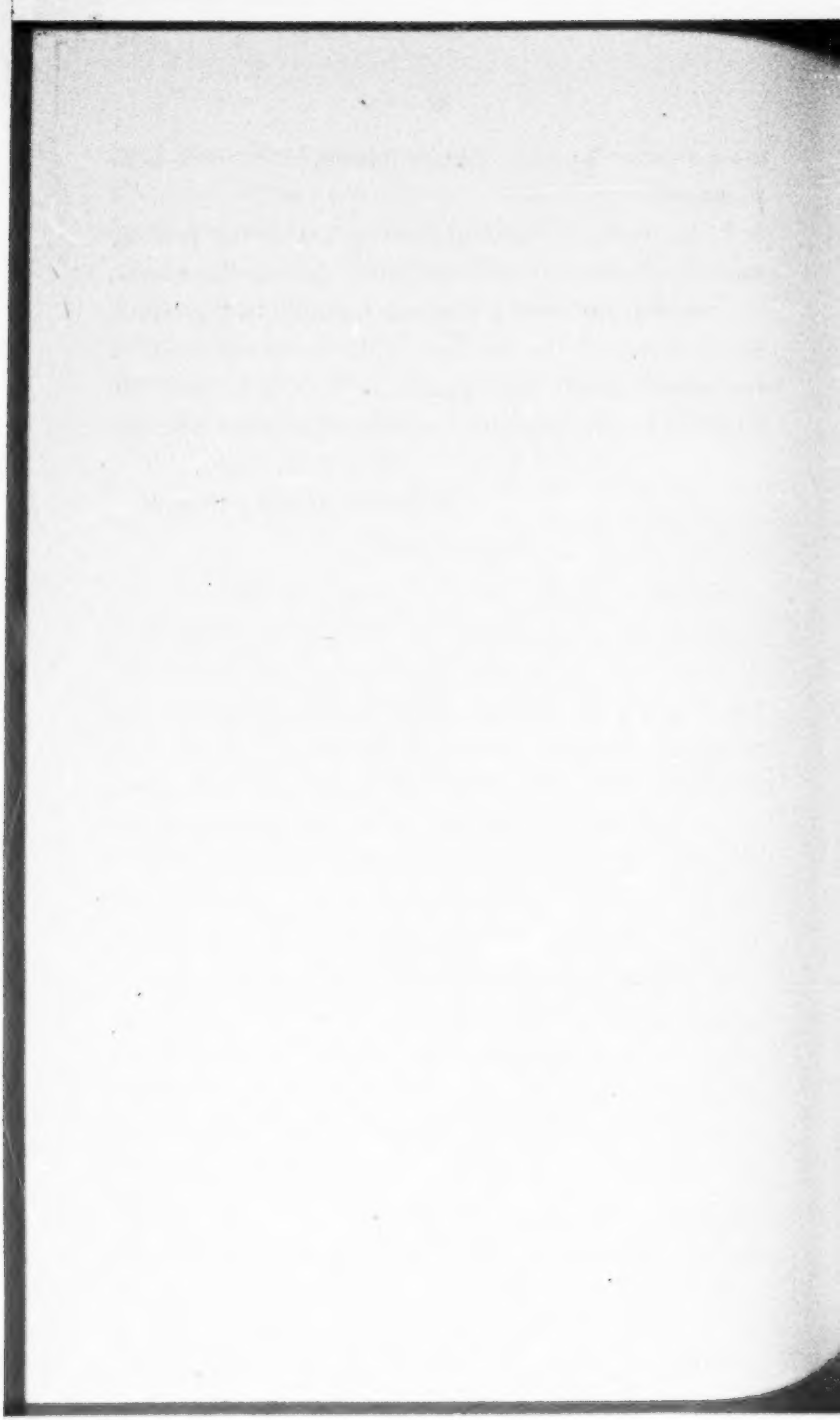
If the Government is correct in its contentions, it is important that the court shall make an unqualified announcement of the law on the subject in order that this controversy, embracing many cases, may be finally settled. For this seems to be, so to speak, the last ditch in the contest on these laws—the last important gap yet to be filled. The Chinese, no doubt, will continue their attempts to enter the country clandestinely, however the law may be determined, and however firmly it may seek to hold them to their just rights under the treaty and statutes. But this, so far as can be perceived, is the only unsettled controversy of any magnitude which remains to give aid and comfort to fraudulent claimants, seeking by appeals, *habeas corpus*, and various other devices, for delay—for some hopeful method of evading the law. In very many of the cases all that is really desired is time and an opportunity offered by discharge on bail to

escape from detection and expulsion, with much hope of success.

I beg to recall the court's attention to my preliminary briefs filed, which somewhat discuss the merits.

I respectfully submit that the question of the circuit court of appeals in No. 503 ought to be answered in the negative, and the appeals in Nos. 525 and 526 ought to be dismissed or the judgments below affirmed.

HENRY M. HOYT,
Assistant Attorney-General.



APPENDIX.

TREATY OF 1894 BETWEEN THE UNITED STATES AND CHINA (28 STAT., 1210).

Whereas on the 17th day of November, A. D. 1880, and of Kwanghsü, the sixth year, tenth moon, fifteenth day, a treaty was concluded between the United States and China, for the purpose of regulating, limiting, or suspending the coming of Chinese laborers to, and their residence in, the United States;

And whereas the Government of China, in view of the antagonism and much deprecated and serious disorders to which the presence of Chinese laborers has given rise in certain parts of the United States, desires to prohibit the emigration of such laborers from China to the United States;

And whereas the two Governments desire to cooperate in prohibiting such emigration, and to strengthen in other ways the bonds of friendship between the two countries;

And whereas the two Governments are desirous of adopting reciprocal measures for the better protection of the citizens or subjects of each within the jurisdiction of the other;

Now, therefore, the President of the United States has appointed Walter Q. Gresham, Secretary of State of the United States, as his Plenipotentiary, and His Imperial Majesty, the Emperor of China has appointed Yang Yü, Officer of the second rank, Sub-Director of the Court of Sacrificial Worship, and Envoy Extraordinary and Minister Plenipotentiary to the United

States of America, as his Plenipotentiary; and the said Plenipotentiaries having exhibited their respective Full Powers found to be in due and good form, have agreed upon the following articles:

ARTICLE I.

The High Contracting Parties agree that for a period of ten years, beginning with the date of the exchange of the ratifications of this Convention, the coming, except under the conditions hereinafter specified, of Chinese laborers to the United States shall be absolutely prohibited.

ARTICLE II.

The preceding Article shall not apply to the return to the United States of any registered Chinese laborer who has a lawful wife, child, or parent in the United States, or property therein of the value of one thousand dollars, or debts of like amount due him and pending settlement. Nevertheless, every such Chinese laborer shall, before leaving the United States, deposit, as a condition of his return, with the collector of customs of the district from which he departs, a full description in writing of his family, or property, or debts, as aforesaid, and shall be furnished by said collector with such certificate of his right to return under this Treaty as the laws of the United States may now or hereafter prescribe and not inconsistent with the provisions of this Treaty; and should the written description aforesaid be proved to be false, the right of return thereunder, or of continued residence after return, shall in each case be forfeited.

And such right of return to the United States shall be exercised within one year from the date of leaving the United States; but such right of return to the

United States may be extended for an additional period, not to exceed one year, in cases where by reason of sickness or other cause of disability beyond his control, such Chinese laborer shall be rendered unable sooner to return—which facts shall be fully reported to the Chinese consul at the port of departure, and by him certified, to the satisfaction of the collector of the port at which such Chinese subject shall land in the United States. And no such Chinese laborer shall be permitted to enter the United States by land or sea without producing to the proper officer of the customs the return certificate herein required.

ARTICLE III.

The provisions of this Convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants or travellers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States, they may produce a certificate from their Government or the Government where they last resided vised by the diplomatic or consular representative of the United States in the country or port whence they depart.

It is also agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the Government of the United States as may be necessary to prevent said privilege of transit from being abused.

ARTICLE IV.

In pursuance of Article III of the Immigration Treaty between the United States and China, signed

at Peking on the 17th day of November, 1880, (the 15th day of the tenth month of Kwanghsü, sixth year), it is hereby understood and agreed that Chinese laborers or Chinese of any other class, either permanently or temporarily residing in the United States, shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens. And the Government of the United States reaffirms its obligation, as stated in said Article III, to exert all its power to secure protection to the persons and property of all Chinese subjects in the United States.

ARTICLE V.

The Government of the United States, having by an Act of the Congress, approved May 5, 1892, as amended by an Act approved November 3, 1893, required all Chinese laborers lawfully within the limits of the United States before the passage of the first named Act to be registered as in said Acts provided, with a view of affording them better protection, the Chinese Government will not object to the enforcement of such acts, and reciprocally the Government of the United States recognizes the right of the Government of China to enact and enforce similar laws or regulations for the registration, free of charge, of all laborers, skilled or unskilled, (not merchants as defined by said Acts of Congress), citizens of the United States in China, whether residing within or without the treaty ports.

And the Government of the United States agrees that within twelve months from the date of the exchange of the ratifications of this Convention, and annually, thereafter, it will furnish to the Government

of China registers or reports showing the full name, age, occupation and number or place of residence of all other citizens of the United States, including missionaries, residing both within and without the treaty ports of China, not including, however, diplomatic and other officers of the United States residing or travelling in China upon official business, together with their body and household servants.

ARTICLE VI.

This Convention shall remain in force, for a period of ten years beginning with the date of the exchange of ratifications, and, if six months before the expiration of the said period of ten years, neither Government shall have formally given notice of its final termination to the other, it shall remain in full force for another like period of ten years.

In faith whereof, we, the respective plenipotentiaries, have signed this Convention and have hereunto affixed our seals.

Done, in duplicate, at Washington, the 17th day of March, A. D. 1894.

WALTER Q. GRESHAM [SEAL.]
YANG YU [SEAL.]

SECTIONS 4, 6, 12, ACT OF JULY 5, 1884 (23 STAT., 115).

* * * * * * *

SEC. 4. That for the purpose of properly identifying Chinese laborers who were in the United States on the seventeenth day of November, eighteen hundred and eighty, or who shall have come into the same before the expiration of ninety days next after the passage of the act to which this act is amendatory, and in order

to furnish them with the proper evidence of their right to go from and come to the United States as provided by the said act and treaty between the United States and China dated November seventeenth, eighteen hundred and eighty, the collector of customs of the district from which any such Chinese laborer shall depart from the United States shall, in person or by deputy, go on board each vessel having on board any such Chinese laborer, and cleared or about to sail from his district for a foreign port, and on such vessel make a list of all such Chinese laborers, which shall be entered in registry books, to be kept for that purpose in which shall be stated the individual, family, and tribal name in full, the age, occupation, when and where followed, last place of residence, physical marks or peculiarities, and all facts necessary for the identification of each such Chinese laborers, which books shall be safely kept in the custom-house; and every such Chinese laborer so departing from the United States shall be entitled to and shall receive, free of any charge or cost upon application therefor, from the collector or his deputy, in the name of said collector and attested by said collector's seal of office, at the time such list is taken, a certificate, signed by the collector or his deputy and attested by his seal of office in such form as the Secretary of the Treasury shall prescribe, which certificate shall contain a statement of the individual, family, and tribal name in full, age, occupation, when and where followed, of the Chinese laborer to whom the certificate is issued, corresponding with the said list and registry in all particulars.

In case any Chinese laborer, after having received such certificate, shall leave such vessel before her de-

parture, he shall deliver his certificate to the master of the vessel; and if such Chinese laborer shall fail to return to such vessel before her departure from port, the certificate shall be delivered by the master to the collector of customs for cancellation.

The certificate herein provided for shall entitle the Chinese laborer to whom the same is issued to return to and reenter the United States upon producing and delivering the same to the collector of customs of the district at which such Chinese laborer shall seek to reenter, and said certificate shall be the only evidence permissible to establish his right of reentry; and upon delivering of such certificate by such Chinese laborer to the collector of customs at the time of reentry in the United States, said collector shall cause the same to be filed in the custom-house and duly cancelled.

* * * * *

SEC. 6. That in order to the faithful execution of the provisions of this act, every Chinese person, other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese Government, or of such other foreign government of which at the time such Chinese person shall be a subject, in each case to be evidenced by a certificate issued by such government, which certificate shall be in the English language, and shall show such permission, with the name of the permitted person in his or her proper signature, and which certificate shall state the individual, family, and tribal name in full; title or official rank, if any; the age, height, and all physical peculiarities; former and present occupation or profession, when and where and how long pursued;

and place of residence of the person to whom the certificate is issued, and that such person is entitled by this act to come within the United States.

If the person so applying for a certificate shall be a merchant, said certificate shall, in addition to above requirements, state the nature, character, and estimated value of the business carried on by him prior to and at the time of his application as aforesaid: *Provided*, That nothing in this act nor said treaty shall be construed as embracing within the meaning of the word 'merchants' hucksters, peddlers, or those engaged in taking, drying or otherwise preserving shell, or other fish, for home consumption or exportation.

If the certificate be sought for the purpose of travel for curiosity, it shall also state whether the applicant intends to pass through or travel within the United States, together with his financial standing in the country from which such certificate is desired.

The certificate provided for in this act, and the identity of the person named therein, shall, before such person goes on board any vessel to proceed to the United States, be vised by the endorsement of the diplomatic representatives of the United States in the foreign country from which such certificate issues, or of the consular representative of the United States at the port or place from which the person named in the certificate is about to depart; and such diplomatic representative or consular representative whose endorsement is so required is hereby empowered, and it shall be his duty, before endorsing such certificate as aforesaid, to examine into the truth of the statements set forth in said certificate, and if he shall find upon examination that said or any of the statements therein contained are untrue it shall be his duty to refuse to endorse the same.

Such certificate viséd as aforesaid shall be prima facie evidence of the facts set forth therein, and shall be produced to the collector of customs of the port in the district in the United States at which the person named therein shall arrive, and afterward produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disproved by the United States authorities.

* * * * * *

SEC. 12. That no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel.

And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, and at the cost of the United States, after being brought before some justice, judge, or commissioner of a court of the United States and found to be one not lawfully to be or to remain in the United States, and in all such cases the person who brought or aided in bringing such person to the United States shall be liable to the Government of the United States for all necessary expenses incurred in such investigation and removal; and all peace officers of the several States and Territories of the United States are hereby invested with the same authority as a marshal or United States marshal in reference to carrying out the provisions of this act or the act of which this is amendatory, as a marshal or deputy marshal of

the United States, and shall be entitled to like compensation to be audited and paid by the same officers.

And the United States shall pay all costs and charges for the maintenance and return of any Chinese person having the certificate prescribed by law as entitling such Chinese person to come into the United States who may not have been permitted to land from any vessel by reason of any of the provisions of this act.

SECTIONS 1, 3, 6, ACT OF MAY 5, 1892; 27 STAT., 25.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all laws now in force prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent are hereby continued in force for a period of ten years from the passage of this act.

* * * * *

SEC. 3. That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States,

* * * * *

SEC. 6. And it shall be the duty of all Chinese laborers within the limits of the United States at the time of the passage of this act, and who are entitled to remain in the United States, to apply to the collector of internal revenue of their respective districts, within one year after the passage of this act, for a certificate of residence, and any Chinese laborer within

the limits of the United States who shall neglect, fail, or refuse to comply with the provisions of this act, or who, after one year from the passage hereof, shall be found within the jurisdiction of the United States without such certificate of residence, shall be deemed and adjudged to be unlawfully within the United States, and may be arrested by any United States customs official, collector of internal revenue or his deputies, and taken before a United States judge, whose duty it shall be to order that he be deported from the United States, as hereinbefore provided, unless he shall establish clearly to the satisfaction of said judge that by reason of accident, sickness, or other unavoidable cause, he has been unable to procure his certificate, and to the satisfaction of the court, and by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act; and if upon the hearing it shall appear that he is so entitled to a certificate, it shall be granted upon his paying the cost.

Should it appear that said Chinaman had procured a certificate which has been lost or destroyed, he shall be detained and judgment suspended a reasonable time to enable him to procure a duplicate from the officer granting it, and in such cases the cost of said arrest and trial shall be in the discretion of the court.

And any Chinese person, other than a Chinese laborer, having a right to be and remain in the United States, desiring such certificate as evidence of such right, may apply for and receive the same without charge.

UNRATIFIED TREATY OF 1888. (EX. DOC. 272, FIFTIETH CONGRESS, FIRST SESSION, PP. 32–34.)

Whereas on the 17th day of November, A. D. 1880, a treaty was concluded between the United States and China for the purpose of regulating, limiting, or suspending the coming of Chinese laborers to, and their residence in, the United States;

And whereas the Government of China, in view of the antagonism and much deprecated and serious disorders to which the presence of Chinese laborers has given rise in certain parts of the United States, desires to prohibit the emigration of such laborers from China to the United States;

And whereas the Government of the United States and the Government of China desire to cooperate in prohibiting such emigration, and to strengthen in other ways the bonds of friendship between the two countries;

Now, therefore, the President of the United States has appointed Thomas F. Bayard Secretary of State of the United States as his Plenipotentiary; and His Imperial Majesty the Emperor of China has appointed Chang Yen Hoon Minister of the Third Rank of the Imperial Court, Civil President of the Board of Imperial Cavalry and Envoy Extraordinary and Minister Plenipotentiary as his Plenipotentiary; and the said Plenipotentiaries, having exhibited their respective Full Powers found to be in due and good form, have agreed upon the following articles:

ARTICLE I.

The High Contracting parties agree that for a period of twenty years, beginning with the date of the exchange of the ratifications of this Convention, the

coming, except under the conditions hereinafter specified, of Chinese laborers to the United States shall be absolutely prohibited.

ARTICLE II.

The preceding article shall not apply to the return to the United States of any Chinese laborer who has a lawful wife, child, or parent in the United States, or property therein of the value of one thousand dollars, or debts of like amount due him and pending settlement. Nevertheless, every such Chinese laborer shall, before leaving the United States, deposit, as a condition of his return, with the collector of customs of the district from which he departs, a full description in writing of his family, or property, or debts, as aforesaid, and shall be furnished by said collector with such certificate of his right to return under this Treaty as the laws of the United States may now or hereafter prescribe and not inconsistent with the provisions of this Treaty; and should the written description aforesaid be proved to be false, the right of return thereunder, or of continued residence after return, shall in each case be forfeited.

And such right of return to the United States shall be exercised within one year from the date of leaving the United States; but such right of return to the United States may be extended for an additional period, not to exceed one year, in cases where, by reason of sickness or other cause of disability beyond his control, such Chinese laborer shall be rendered unable sooner to return, which facts shall be fully reported to the Chinese consul at the port of departure, and by him certified, to the satisfaction of the collector of the port at which such Chinese subject shall land in the United States.

Article III.

The provisions of this Convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants, or travelers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described, to admission into the United States they may produce a certificate from their Government or the Government where they last resided, viséd by the diplomatic or consular representative of the United States in the country or port whence they depart.

It is also agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulation by the Government of the United States as may be necessary to prevent said privilege of transit from being abused.

Article IV.

In pursuance of Article III. of the Immigration Treaty between the United States and China, signed at Peking on the 17th day of November, 1880, it is hereby understood and agreed that Chinese laborers, or Chinese of any other class, either permanently or temporarily residing in the United States, shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens. And the Government of the United States reaffirms its obligation, as stated in said Article III., to exert all its power to secure protection to the persons and property of all Chinese subjects in the United States.

ARTICLE V.

Whereas, Chinese subjects, being in remote and unsettled regions of the United States, have been the victims of injuries in their persons and property at the hands of wicked and lawless men, which unexpected events the Chinese Government regrets, and for which it has claimed an indemnity the legal obligation of which the Government of the United States denies; and whereas the Government of the United States, humanely, considering these injuries and bearing in mind the firm and ancient friendship between the United States and China, which the High Contracting Parties wish to cement, is desirious of alleviating the exceptional and deplorable sufferings and losses to which the aforesaid Chinese have been subjected; therefore, the United States, without reference to the question of liability therefor (which as a legal obligation it denies), agrees to pay on or before the first day of March, 1889, the sum of Two hundred and seventy-six thousand six hundred and nineteen dollars and seventy-five cents ($276,619.75) to the Chinese Minister at this capital, who shall accept the same, on behalf of his Government, as full indemnity for all losses and injuries sustained by Chinese subjects as aforesaid, and shall distribute the said money among the said sufferers and their relatives.

ARTICLE VI.

This Convention shall remain in force for a period of twenty years, beginning with the date of the exchange of ratifications; and if, six months before the expiration of the said period of twenty years, neither Government shall formally have given notice of its termination to the other, it shall remain in full force for another like period of twenty years.

FIRST PROPOSED DRAFT OF CONVENTION OF 1894, SUBMITTED BY THE MINISTER OF CHINA.

Whereas, on the 15th day of the tenth month of Kwang Hsü sixth year, the 17th day of November, Anno Domini 1880 a treaty was concluded between the United States and China, for the purpose of regulating, limiting or suspending the coming of Chinese laborers to and their residence in the United States;

And whereas in the 14th year of Kwang Hsü, Anno Domini 1888, the Government of China and the Government of the United States, in view of the antagonism and much deprecated and serious disorders to which the presence of Chinese laborers had given rise in certain parts of the United States, drafted a Convention for the purpose of prohibiting the emigration of such laborers from China to the United States;

And whereas the legislative measures adopted by the Government of the United States, in consequence of the non-ratification of the aforesaid Convention, have been found to be in conflict with the interests of China and not in pursuance of the Treaty of the sixth year of Kwang Hsü, Anno Domini 1880;

And whereas the Government of the United States and the Government of China, in consideration of the annulment by the Government of the former of all the legislative measures enacted in and since the year 1888 affecting the coming of Chinese subjects into the territory of the United States and their residence therein, desire to agree upon a new Convention for the prohibition of emigration of laborers from China to the United States and the protection of Chinese interests and of the Chinese people—residing in the United States, to the end that the two people may live together in harmony and peace and that the bonds of friendship between the two nations may be further strengthened;

Now, therefore, the President of the United States has appointed ——— ——— as his Plenipotentiary and his Imperial Majesty, the Emperor of China has appointed ——— ——— as his Plenipotentiary, and the said Plenipotentiaries having exhibited their respective full powers, found to be in due and good form, have agreed upon the following articles:—

ARTICLE I. The High Contracting Parties agree that for a period of ten years, beginning with the date of the exchange of the ratifications of this Convention, the coming, except under the conditions hereinafter specified, of Chinese laborers to the United States shall be absolutely prohibited.

ARTICLE II. The preceding Article shall not apply to the return to the United States of any Chinese laborer who has a lawful wife, child, or parents in the United States, or property therein of the value of One thousand dollars, or debts of like amount due him and pending settlement. Never-the-less, every such Chinese laborer shall, before leaving the United States, deposit, as a condition of his return, with the Collector of Customs of the district from which he departs, a full description in writing of his family, or property, or debts, as aforesaid, and shall be furnished by said Collector with such certificate of his right to return under this Treaty as the laws of the United States may now or hereafter prescribe, and not inconsistent with the provisions of this Treaty; and should the written description aforesaid be proved to be false, the right of return thereunder, or of continued residence after return, shall in each case be forfeited.

And such right of return to the United States shall be exercised within one year from the date of leaving the United States, but such right of return to the

United States may be extended for an additional period, not to exceed one year, in cases where, by reason of sickness or other cause of disability beyond his control, such Chinese laborer shall be rendered unable sooner to return—which facts shall be fully reported to the Chinese Consul at the port of departure, and by him certified to the satisfaction of the Collector of the port at which such Chinese subject shall land in the United States.

And the wives and minor children of Chinese persons, who are now in the United States, and who are entitled to be and remain therein, shall be entitled to enter the United States upon the production of a certificate issued by the American Minister or by any American Consul-General or Consul accredited to the Chinese Government.

ARTICLE III. The provisions of this Convention shall not affect the right at present enjoyed of Chinese subjects being officials, teachers, students, merchants, or travellers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States, they may produce a certificate from their Government, or the Government where they last resided viséed by the Diplomatic or Consular representative of the United States in the country or port whence they depart.

It is also agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the Government of the United States as may be necessary to prevent said privilege of transit from being abused.

ARTICLE IV. In pursuance of Article III of the Immigration Treaty between the United States and China signed at Peking, on the 17th day of November 1880, it is hereby understood and agreed that Chinese laborers, or Chinese of any other class, either permanently or temporarily residing in the United States, shall have for the protection of their persons and property, all rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens and the Government of the United States reaffirms its obligation, as stated in said Article III to exert all its power to secure protection to the persons and property of all Chinese subjects in the United States.

ARTICLE V. It being the object of the Government of the United States to avoid the ingress into her territory of elements which may endanger the good order of the country, the said Government hereby agrees that if Chinese subjects, having violated any law of the Chinese Empire, take refuge in the territory of the United States under the guise of merchants, students, travellers, religious emissaries or the like or laborers and the same is ascertained by the Chinese Government and by them brought to the notice of the Government of the United States, it shall be the duty of the local authorities to apprehend every such offender of the Chinese law and to deliver him over to the custody of the proper accredited representative of that Government for deportation back to China.

Reciprocally, if any citizens of the United States, having committed an offence against the laws of that country, take refuge in the territory of China, the Government of China agrees likewise to grant extradition of such citizens to the Government of the United States upon its application for same.

ARTICLE VI. Whereas the Government of the United States, in order to afford better protection to Chinese subjects residing in the United States, has recently enacted a law providing for the registration of such Chinese; whereas no legislation of this nature has been enacted by the Government of any other nation for the protection of aliens residing in its territory; whereas the Government of China, out of a sincere regard for friendly international relations has given her acquiescence to the recent legislation of the United States aforesaid; and whereas it behooves China, having equal responsibility in guaranteeing protection to citizens of the United States residing in her territory, to adopt a similar course; it is hereby agreed between the Government of the United States and the Government of China, that after the exchange of ratifications of this Convention the Government of the latter, may adopt measures similar to those now enforced by the Government of the former, providing for the registration of all citizens of the United States residing in China, whether as missionaries, students, merchants, travellers or otherwise, to the end that protection may be always guaranteed them, exception being made in the case of diplomatic and other officers of the United States Government residing or travelling in China upon the business of their own Government, together with their body and household servants, whose registration shall not be required.

This being a special article of reciprocity between the two nations, the 'most favored nation' clause shall not be quoted to apply thereto.

Article VII. This Convention shall remain in force for a period of ten years, beginning with the date of

the exchange of the ratifications; and if, six months before the expiration of the said period of ten years, neither Government shall formally have given notice of its termination to the other, it shall remain in full force for another like period of ten years.

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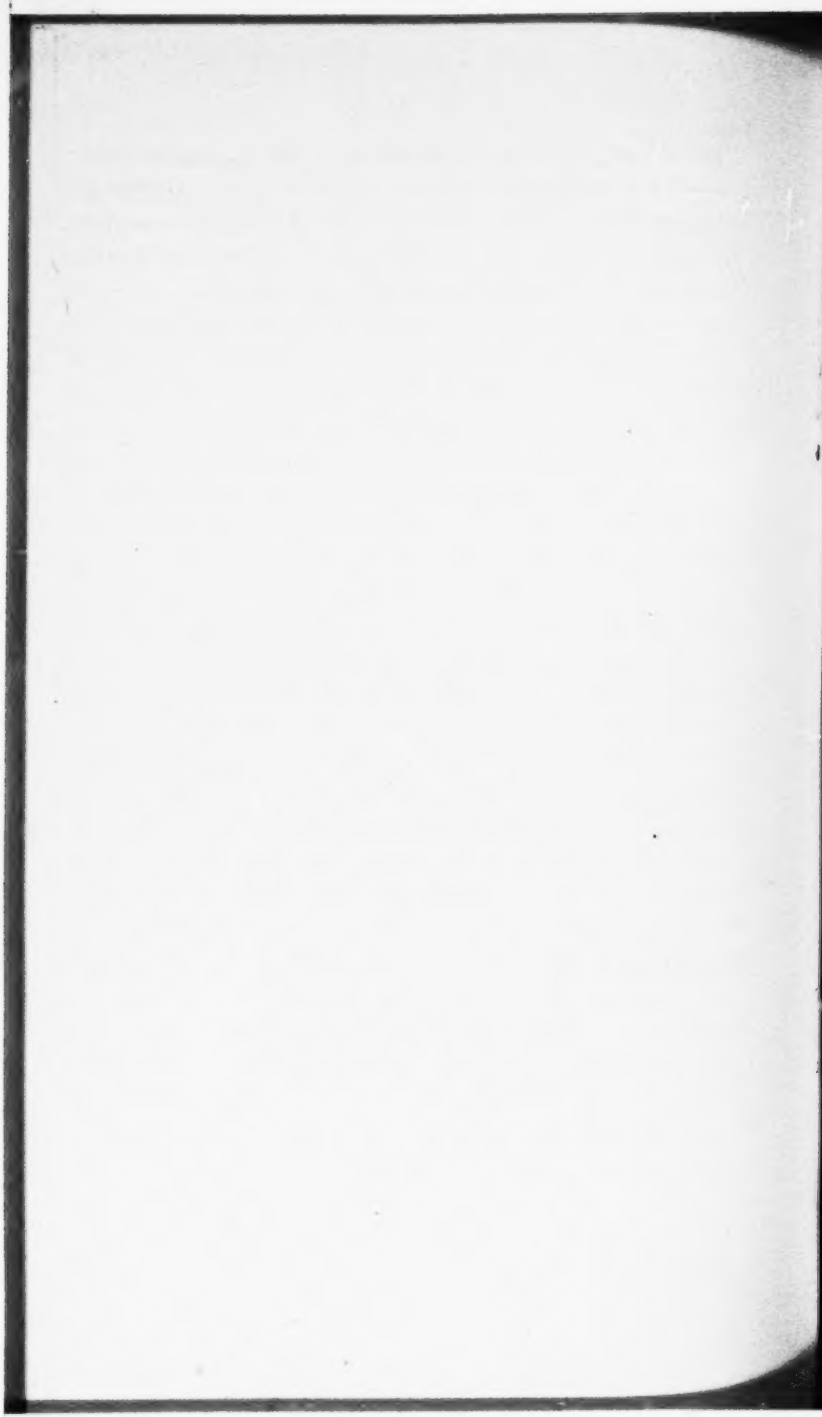


Office Supreme Court U.S.
FILED
MAR 29 1902
JAMES H. McKENNEY,
Clerk.

3919

Nos. 503, 525 & 526

Sug. Br. of Atty. Gen. (Hoyt)
for United States.

In the Supreme Court of the United States.

Filed Mar. 29, 1902.

OCTOBER TERM, 1901.

THE UNITED STATES, APPELLANT,
v.
LEE YEN TAI. } No. 503.

CHIN BAK KAN
v.
THE UNITED STATES. } No. 525.

CHIN YING
v.
THE UNITED STATES. } No. 526.

I beg to submit to the court, with the consent of opposing counsel, an opinion recently delivered by the circuit court of appeals for the ninth circuit in the case of *Fong Mey Yuk*. This was one of the so-called "slave girl" cases, the Chinese woman alleging American citizenship. It is evident that the court was not satisfied as to the fact of birth in the United States, or as to the permanent domicile and residence here of the parents, required by the *Wong Kim Ark* decision.

HENRY M. HOYT,
Assistant Attorney-General.

21284—02

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 716.

FONG MEY YUK, APPELLANT, v. THE UNITED STATES OF AMERICA, APPELLEE.

BEFORE GILBERT AND MORROW, CIRCUIT JUDGES, AND HAWLEY, DISTRICT JUDGE.

The appeal in this case is taken from the judgment of the district court affirming an order of deportation of the appellant, Fong Mey Yuk, who was arrested at San Francisco on April 20, 1901, upon a warrant issued by the United States commissioner, upon a complaint sworn to and lodged with said commissioner charging the appellant with being a Chinese manual laborer without the certificate of residence required by the act of Congress, entitled "An act to prohibit the coming of Chinese persons into the United States," approved May 5, 1892, and the act amendatory, approved November 3, 1893. On May 2, 1901, the appellant was brought to trial before said commissioner. Upon the evidence adduced, the commissioner made his findings and judgment of deportation, holding that the appellant is a Chinese manual laborer and a subject of the Empire of China, and that she was found within the limits of the United States without the certificate of residence required by said acts, and that she had not shown that she had been unable to obtain such certificate for any of the reasons which the act specifies as excuses therefor.

Gilbert, circuit judge, after stating the case as above, delivered the opinion of the court:

The appeal presents two questions: First, had the United States commissioner jurisdiction to hear and determine the charge set forth in the complaint? and, second, was the evidence sufficient to justify his judgment? Section 12 of the act of May 6, 1882, provides that any Chinese person found unlawfully within the United States shall be deported to the country whence he came, after being brought before some "justice, judge, or commissioner of a court of the United States, and found to be one not lawfully entitled to be or remain in the United States." Section 12 of the act of July 5, 1884, provides substantially the same remedy as that of the act of May 6, 1882. Section 13 of the act of September 13, 1888, provides that any Chinese person found unlawfully in the United States may be arrested upon a warrant issued upon a complaint under oath "by any justice, judge, or commissioner

of any United States court," and that when convicted upon a hearing and found and adjudged to be one not lawfully entitled to be or remain in the United States to be removed to the country whence he came. Section 2 of the act of May 5, 1892, provides "that any Chinese person or person of Chinese descent when convicted and adjudged under any of said laws to be not lawfully entitled to be or remain in the United States shall be removed from the United States to China." The previous acts had required that such person be removed to the country whence he came. Section 6 makes provision for the issuance of certificates of residence to Chinese persons lawfully in the United States, and enacts that "any Chinese laborer within the limits of the United States who shall neglect, fail, or refuse to comply with the provisions of this act, or who, after one year from the passage thereof, shall be found within the jurisdiction of the United States without such certificate of residence, shall be decreed and adjudged to be unlawfully within the United States, and may be arrested by any United States customs official, collector of internal revenue or his deputies, United States marshal or his deputies, and taken before a United States judge." It is contended that all the prior legislation referred to Chinese who unlawfully entered the United States, and that by the act of 1892 provision was made for the deportation of a different class—those who, although they had entered lawfully, had failed to acquire the right to remain, and were therefore unlawfully within the United States—and it is contended that as to this second class the jurisdiction to order deportation is conferred only upon "a United States judge." Section 1 of the act of May 5, 1892, provides: "All laws now in force prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent are hereby continued in force for a period of ten years from the passage of this act." Those laws, so continued in force, it may be conceded have reference to prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent, and not the deportation of Chinese persons found to be unlawfully within the country. There would be no authority in the act of May 5, 1892, for the present proceeding were it not for section 3, which provides as follows: "That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States." That section declares in plain terms that a proceeding may be instituted before a commissioner against any Chinese arrested under the provisions of the act of May 5, 1892. It has the effect to enlarge the provision of section 6 and to enact that the proceeding may not only be before a United States judge, but that it may be before a justice, judge, or commissioner. If there be any doubt that this is the true construction of the act, it is dispelled by the act of March 3, 1901 (31 Stats., 1093), which provides as follows: "That it shall be lawful for the district attorney of the district in which any Chinese person may be arrested for being found unlawfully within the United States or having unlawfully entered the United States to designate the United States commissioner within such district before whom such Chinese person shall be taken for hearing."

We find no ground for holding that the evidence is insufficient to justify the findings, judgment, and order of deportation. The commissioner saw the witnesses, heard their testimony, and reached the conclusion that the appellant was born in China and that she was a laborer and that she had not procured the certificate entitling her to remain in this country as provided by law. There is no contention that in so holding he was guided by any erroneous view of the law or the evidence. Such being the case, we would not be justified in disturbing his conclusion, even if we deemed it contrary to the weight of the evidence, which we do not. The burden of proof rested upon the appellant to prove to the "satisfaction of the court" the facts upon which depended her right to remain in the United States. This she failed to do. The judgment of the district court is affirmed.

(Indorsed:) Opinion. Filed February 24, 1902. F. D. Monckton, clerk.

O

Supreme Court of the United States.

October Term, 1904.

THE UNITED STATES,
Appellant,

vs.

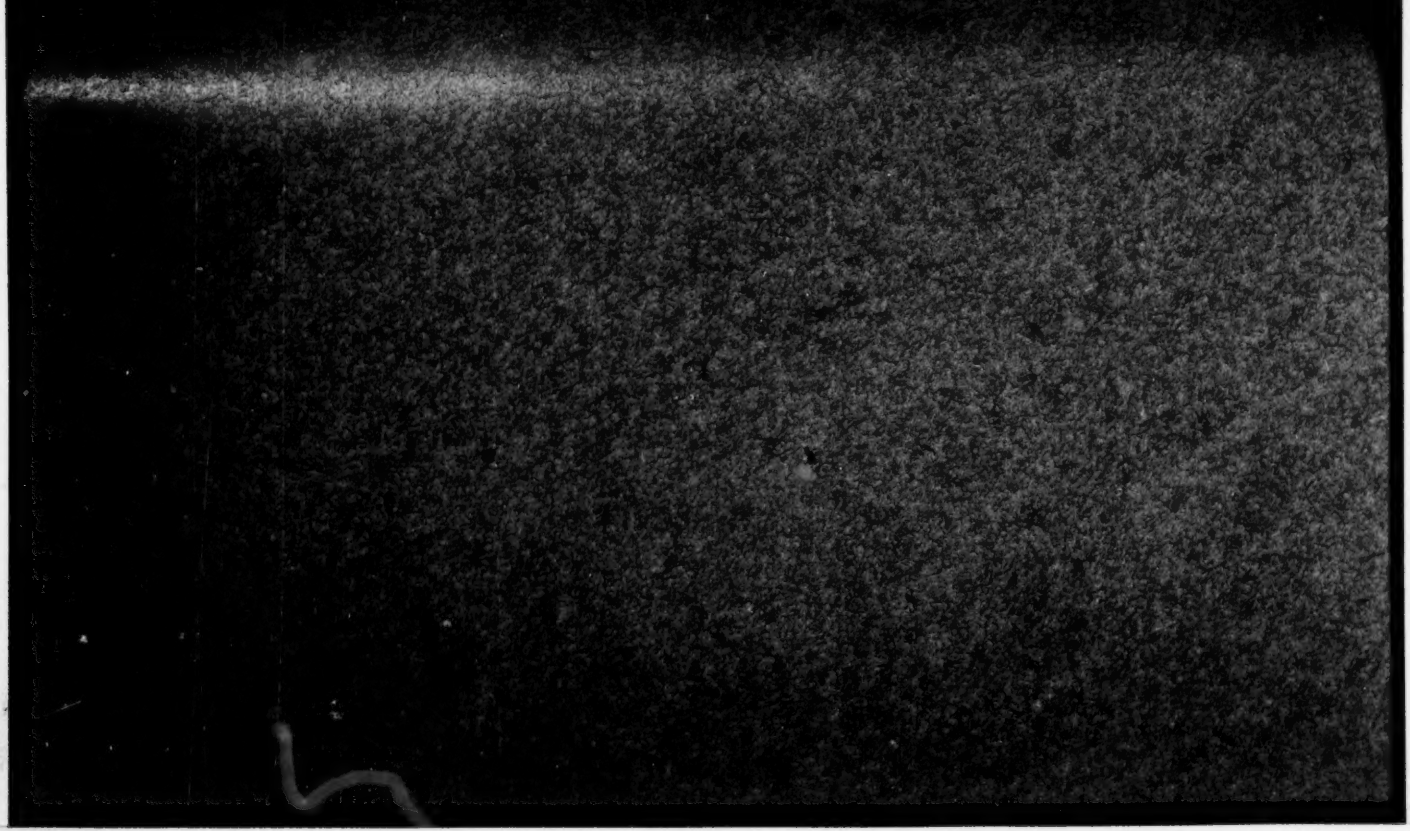
LEE YEN TAI,
Appellee.

No. 1002.

BRIEF FOR APPELLEE.

B. Dewitson,
Max J. Kohler,
Of Counsel for Appellee.

Appeal Printing Co., 49-51 Ward Street.
Telephone, 2nd Cortlandt.
1904.



IN THE

Supreme Court of the United States.

THE UNITED STATES, Appellant, vs. LEE YEN TAI, Appellee.	No. 503.

Brief for Appellee.

This case is here upon a Certificate from the United States Circuit Court of Appeals for the Second Circuit of the question:

"Is Section 12 of "An Act to execute certain treaty stipulations relating to the Chinese, approved May 6th, 1882, as amended by the Amendatory Act of July 5, 1884, and continued in force by Section 1 of the act of May 5th, 1892, repealed by the Treaty or Convention with China of December 8th, 1894?"

The certificate of that Court, dated December 17th, 1901, was superseded by the amended certificate, dated December 20, 1901, which states the facts and the question certified more accurately (Record, fol. 7-9).

It appears from the certificate that on October 8th, 1900, defendant, Lee Yen Tai, alias Lee Gin Moy, was arrested within the United States upon a warrant issued by a United States Commissioner for the Northern District of New York, charging him with being a Chinese person and laborer who had unlawfully entered the United States without producing the certificate required of Chinese persons seeking to enter, and the commissioner found that he was a Chinese person and laborer who had entered unlawfully without said certificate and ordered his deportation to China. He claimed to be a Chinese merchant, but did not produce the certificate prescribed for Chinese persons of the privileged classes to establish his mercantile status (see United States vs. Mrs. Gue Lim, 176 U. S.,459, 467). Thereafter, while in the custody of the U. S. Marshal within the Southern District of New York for the purpose of deportation, a writ of habeas corpus issued out of the U. S. District Court for the Southern District of New York, upon a petition averring that he was a Chinese merchant, but was in custody under the above described order of deportation of a United States Commissioner, but that said order was null and void and made without jurisdiction, because the United States Commissioner had no jurisdiction of said cause by reason of the Treaty of the United States with China of December 8th, 1894. The warrant of deportation was returned in obedience to said writ, whereupon Judge Addison Brown sustained defendant's claim, and directed defendant's discharge.

The United States appealed to the Circuit Court of Appeals, which after argument decided various subsidiary points against the Government, but certified the question of the Commissioner's jurisdiction to this Court, as one involving the construction of said treaty with China.

Section 12 of the Act of 1882 (amended by Section 12 of the Act of 1884) was continued in force for a further period of ten years by the Act of 1892 known as the Geary Law; it is the procedure section under which Chinese persons found within the United States, charged to have entered the United States unlawfully, have been dealt with heretofore in judicial proceedings looking to their deportation.

The cause was advanced by consent and two other cases, involving this and other questions, brought here on the appeal of the Chinese defendants, were set down with it for argument as one cause (Nos. 525 and 526).

It is contended on behalf of the Chinese defendants that there is no existing authority for judicial proceedings for the deportation of Chinese persons alleged to have entered the United States unlawfully, because the procedure provision (Section 12 of the Act of 1884) was repealed by the treaty of 1894. It is not contended that exclusion by executive action of Chinese laborers is no longer authorized, but, on the contrary, the treaty of 1894 is in line with the general policy expressed in the Act of Aug. 18, 1894 (28 Stat., 390), passed after it was signed, leaving this subject matter wholly

to administrative action (Lem Moon Sing vs. U. S., 158 U. S., 538, and later appropriation acts considered in Williams vs. U. S., 168 U. S. 382, 388), and divesting the Courts of jurisdiction over these cases. Nor is it contended that the jurisdiction of U. S. Judges under Section 6 of the Act of 1892 as amended in 1893 (Fong Yue Ting vs. U. S., 149 U. S., 698), has been interfered with to order the deportation of Chinese laborers, who were such at the time of the passage of these acts, and neglected to register. That provision is expressly continued by the Treaty of 1894, does not concern itself with alleged unlawful entry, and is not involved in these cases.

POINT I.

The Treaty of 1894 (2 Sup. Rev. St. 155, 28 Stat. at L., p. 1210), should be construed as covering the whole ground of Chinese exclusion, and its failure to prescribe any judicial procedure for deportation in alleged unlawful entry cases and to continue any prior statute to that effect, renders the act of the U. S. Commissioner herein null, as made without jurisdiction.

The present cases present for the first time directly the question, what changes in regard to the treatment of Chinese persons were effected by the Convention with China of 1894, which concededly made some radical modifications of statutory pro-

visions. This Treaty was incidentally referred to in the case of United States vs. Mrs. Gue Lim, 176 U. S., 459, but there was no appearance in that case for the Chinese respondents, and nothing inconsistent with our contentions was said therein by this Court, as more clearly shown hereafter. China has, however, through diplomatic channels, made the claims herein urged. It is submitted that the Treaty of 1894 covers the whole subject of Chinese immigration to the United States, and repealed *ipso facto* all prior provisions not therein specifically recognized and continued in force, including Section 12 of the Act of 1884, upon which the Commissioner's jurisdiction rests.

From its very nature, the admission or exclusion of particular classes of aliens is an eminently proper subject for regulation by treaty, rather than by legislation, and it has been our national policy to so regulate the matter. Almost every treaty recognizes or confers the right of entry into the United States of alien subjects of the other contracting party, and similiarly it is there one would naturally expect to encounter restrictions of said right. In the case of Chinese immigrants the right of entry expressly conferred by the Treaty of 1868 (Fong Yue Ting vs. United States, 149 U. S., 698, 716), was first limited by the Treaty of 1880 (22 Stat. at L., p. 826), by which, subject to certain limitations, China specifically acceded to subsequent legislation by the United States limiting the entry of Chinese LABORERS. Accordingly, our first Chinese Exclusion Act, passed May 6, 1882 (22 Stat., 58, 1 Sup. R. S., p. 342), was

properly entitled "An act to *execute* certain treaty stipulations relating to China," and the Act of 1884 (23 Stat. at L., 1 Sup. R. S., p. 458), merely in terms amended certain provisions of this Act. That certain provisions of the Act might possibly be construed as inconsistent with the treaty stipulations was recognized, and the courts construed the Statutes as far as possible to make them consistent with the treaty (Chew Heong vs. U. S., 112 U. S., 536, U. S. vs. Mrs. Gue Lim, 176 U. S., 459, 465), being compelled to recognize, however, that both have equal force. and that a later Statute will repeal a prior treaty, where the purpose so to do is clear. Conditions in the United States arising from this Chinese labor immigration seemed to call for more stringent measures, and a new treaty with China was negotiated in 1888, covering the ground of all prior Statutes and Treaties (Foreign Relations, 1888, I, 393) but China eventually rejected this treaty, though in the interim Congress had passed the Act of September 13th, 1888 (25 Stat. 476, 2 Sup. R. S., p. 141) to go into effect with respect to its clauses as to Chinese subjects' admission, upon the ratification of that treaty, which latter statute not only covered the ground of the prior statutes and was an implied substitute therefor, but expressly repealed the Acts of 1882 and 1884 (Sec. 15) upon the ratification of said treaty. That treaty was never ratified (Li Sing vs. U. S., 180 U. S., 486, 488). It was only when efforts to deal with this matter by means .of treaties failed, that independent statutes were passed, first the Act of October 1, 1888, then the Acts of

1892 and 1893. In his approval of the Act of Oct. 1, 1888, the President referred to the failure of these negotiations by China's rejection of the treaty, and that this made it his duty "to join the Congress in dealing legislatively with the question of the exclusion of the Chinese laborers, in lieu of further attempts to adjust it by international agreement" (Foreign Relations for 1888, Vol. I., pp. 356-9). The Chinese Government protested continuously from 1882 on against various provisions of these statutes as violations of the subsisting treaty, the protests becoming stronger as the violations became more pronounced (Foreign Relations). That these last-named Acts were in violation of the Treaty of 1880 was conceded by the Courts (Chae Chan Ping vs. U. S., 130 U. S., 581; Fong Yue Ting vs. U. S., 149 U S., 698). In 1894 an international adjustment of these questions was at length effected, the draft Treaty of 1888, with the addition of an article as to registration, and some slight changes in Articles other than the important Article III here involved, being ratified, and prior statutes were thereby modified and the law meliorated. From the very nature of the thing, therefore, we must expect, even *a priori*, to find in the Treaty of 1894 a substitute by international arrangement for the statutory enactments that China had protested against. China's wishes, interests and dignity were now consulted once more, and a measure satisfactory to her, framed.

The new Treaty, as appears upon inspection, made pronounced changes in the law—all by im-

plication-- because of the reasons just considered. Some of these repeals by implication have been specifically recognized by the Government's conduct ever since, based on opinions of Attorneys General and Treasury officers; others have not. Curiously enough, the provisions of this Treaty had not been the subject of judicial construction until this case arose, with the incidental exception referred to, not here relevant.

(1) Changes in the law made by the Treaty of 1894. An examination of the Treaty of 1894 shows that it was designed to cover the whole ground, and to serve as a substitute for prior statutes and treaties on the same subject, not therein specifically continued, and numerous changes in existing law were made by it, all by implication. In fact, the editor of Vol. 2, Sup. Rev. S., (p. 155), adds a note stating that the treaty "is here inserted because it makes important modifications of the existing statutes on this subject." The recitals of the treaty (28 Stat., 1210, 2 Sup. R. S., p. 155) include references to the Treaty of 1880, and the desire of both governments "to co-operate in prohibiting such emigration" of Chinese *laborers*, the prior statutes which China had protested against being studiously ignored, and the matter being carried back to the last joint regulation, the Treaty of 1880. Article I of the treaty prohibits the immigration, except under conditions specified in the treaty, of Chinese laborers only. Article II authorizes the return, under prescribed safeguards, of Chinese laborers to the United States who have been registered, and have a wife,

child or parent in the United States, or property, or debts, of the value of $1,000 there. In this respect, the treaty concededly repeals by implication the Act of Oct. 1, 1888, as well as Sections 3, 4 and 5 of the Acts of 1882 and 1884. Argument to prove this is unnecessary, for a mere comparison of the two so shows, as does the practice of the Government ever since, in admitting such returning laborers under the regulations thereunder prescribed by the Treasury Department (see Regulations, 2 Sup. R. S., pp. 157-8, note).

The next provision (Article III) deals with the admission of the privileged classes, and with transit of laborers across the country; the former is the principal section considered herein, and was treated as modifying the Act of 1884 in an opinion of the Attorney-General quoted *post* (p. 29); the latter part is involved in cases now before this Court. The Treaty changes the law as to privileged classes in the following respects: (*a*) The new certificate may or must emanate from another source than under Section 6 of the Act of 1884, as the Government concedes (21 Opinions, Attorneys General, 347); (*b*) It need not contain all the facts prescribed by Section 6, and the continuance of the requirement of the certificate "of that act" had been expressly omitted from the draft; (*c*) It is not made mandatory, the word "*may*" having been substituted for "shall" produce a certificate "as required in said section;" (*d*) The repealing effect upon the procedure provision of the Act of 1884, which provided the penalty of deportation for admission without the cer-

tificate of that act, resulting from the change in the certificate and phraseology, is a necessary conclusion from these premises.

Article IV of the treaty reiterates in terms the provisions of the earlier treaty of 1880 for the protection of Chinese and slightly enlarges them, again showing the necessity the drafters of the treaty had in mind of re-enacting even then existing consistent provisions, if they are to be continued. Article V will presently be more fully considered; by it China consents to the enforcement of the Acts of 1892 and 1893, requiring all Chinese laborers within the United States at those dates to register, and the United States consents to similar Chinese laws for registration of American laborers in China, and the United States agrees to furnish the names of all other citizens of the United States in China. Article VI provides that the treaty shall remain in force for ten years, and for a further term of ten years thereafter, unless terminated by notice given more than six months before expiration of the first ten years. In point of time, also, the statutes are thus modified, for the treaty provisions continue for ten years from December, 1894, while the statutes expire by their own express limitation (leaving aside effect of the treaty) ten years from May 5th, 1892 (Sec. 1, Act 1892, Sup. R. S., p. 13).

It is thus obvious that this treaty covers the whole subject of Chinese immigration, designedly makes most radical changes in the law, all by im-

plication, and is and was intended to be, a substitute for the prior laws and treaties, which it repealed by implication.

Henrietta Co. vs. Gardner, 173 U. S., 123, 128.

U. S. vs. Rider, 163 U. S., 132.

U. S. vs. Hewecker, 164 U. S., 46.

U. S. vs. Tynen, 11 Wall, 88.

District of Columbia vs. Hutton, 143 U. S., 18.

The Paquete Habana 175 U. S. 677, 685.

> "It is a well settled rule in the construction of statutes, often affirmed and applied by this Court, that even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will act as a repeal of that act," said Mr. Justice Gray for this Court in the last cited case.

"The amending act is more than a revision of the provisions of the Statute of 1887, it is a substitute for them" (Henrietta Co. vs. Gardner, *supra*).

Nor is the absence of express repealing words, relating to the prior statutes, at all strange. A treaty with a foreign country is not the place where one would even expect to find specifically noted, changes made by it in the municipal law of one of the contracting parties.

This principle of law has peculiar force where the inquiry is whether an international agreement

is designed to serve as a substitute for a prior municipal law of one of the contracting parties, which the other had deemed objectionable. Such other cannot be regarded as acquiescing in the continuance of the very municipal enactment it had objected to. Compare the language of the Court in Geofroy vs. Riggs, 133 U. S., 258, 271, quoted *post*.

The opinion of this Court, in the recent case of

Tucker vs. Alexandroff (Jan. 6, 1902), 183 U. S., 424.

Mr. Justice Brown writing, seems here clearly in point. The question under consideration was whether the express terms of a treaty with Russia as to surrender of deserting seamen superseded oral prior obligations that might have existed, apart from treaty, as to surrender of such seamen. On a point on which there was no dissent on the part of the minority, Mr. Justice Brown said for this Court:

> "The treaty with Russia having contained a convention upon this subject, that convention must alone be looked to in determining the rights of the Russian authorities to the reclamation of the relator. Where the signatory powers have themselves fixed the terms upon which deserting seamen shall be surrendered, we have no right to enlarge these powers upon the principles of comity so as to embrace cases not contemplated by the treaty. Upon general principles applicable to the construction of written instruments, the enumeration of certain powers with respect to a particular subject matter is a negation of all other analogous powers with respect to the same subject matter (*Ex parte* McArdle, 7 Wall, 506; Endlich Int. Stats. Secs. 397, 400). As observed by Lord Denham in Aspdin vs.

Austin (5 Q. B., 671, 684), 'where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument.' The rule is curtly stated in the familiar legal maxim, *expressio unius est exclusio alterius*. In several recent cases in this court, we have held that, where a statute gives a certain remedy for usurious interest paid, that remedy is exclusive, though in the absence of such a remedy, the defence might be made by way of set-off or credit upon the original demand. * * *"

"We think, then, that the rights of the parties must be determined by the treaty, but that this particular convention being operative upon both powers, and intended for their mutual protection, should be interpreted in a spirit of *uberrima fides*, and in a manner to carry out its manifest purpose. (Taylor on Intern. Law, Sec. 383). As treaties are solemn engagements, entered into between independent nations for the common advancement of their interests, and the interests of civilization, and as their main object is not only to avoid war and secure a lasting and perpetual peace, but to promote a friendly feeling between the people of the two countries, they should be interpreted in that broad and liberal spirit, which is calculated to make for the existence of a perpetual amity, so far as it can be done without the sacrifice of individual rights or those principles of personal liberty which lie at the foundation of our jurisprudence. It is said by Chancellor Kent in his Commentaries (Vol. 1, p. 174):

" 'Treaties of every kind are to receive a fair and liberal interpretation according to the intention of the contracting parties, and are to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the

same rules of construction and course of reasoning which we apply to the interpretation of private contracts.' "

In Leavenworth R. Co. vs. U. S., 92 U. S., 733, this Court said:

"But treaties, like statutes, must rest on the words used; 'nothing adding thereto, nothing diminishing.'

In Rex vs. Barrell, 12 Ad. & Ell., 468, Patteson, Justice, said:

'I see the necessity of not importing into statutes words which are not found there. Such a mode of interpretation only gives occasion to endless difficulty. And the Courts have always treated the subject the same way when asked to supply words in order to give a statute a particular meaning which it would not bear without them.' "

(2). As much weight is given by the government herein to the provisions of Article V of the treaty, that provision will receive more consideration on our part. The section deals with the registration of Chinese and American subjects, respectively, and is a distinct and severable element, and in fact is the only provision as to which the treaty of 1894 differs materially from the treaty signed in 1888, which had no such clause. This in itself indicates its independent and severable character. In fact, until 1892, such registration provisions were unprecedented, and the right to thus deal with aliens already lawfully here, and expel them for non-registering, was doubtful, until determined by this Court by a closely divided vote in the Fong Yue Ting case in 149 U. S. The

provision first appears on our statute books as Sec. 6 of the Act of 1892 (2 Sup. R. S., 13, amended in 1893; 2 Sup. R. S., p. 153). Until then, our statutes and treaties dealt only with unlawful entries into the United States, and with being and remaining there, because of an unlawful entry. The present cases are all cases of alleged unlawful entry, and the Commissioner's jurisdiction is thus limited to that issue: (*a*) by the language of the warrant and complaint (fol. 23); (*b*) by the circumstance that jurisdiction *over non registration cases* is limited to U. S. Judges by the express terms of Section 6 of the Acts of 1892 and 1893, and it has accordingly been held that only Federal Judges and not Commissioners have jurisdiction in such cases (Fong Yue Ting vs. U. S., 149 U. S., at 726), decision without opinion, by Lacombe, J., in March, 1898, in the case of U. S. vs. Sing Kin San, on which occasion a California decision to the contrary was disregarded, and Treasury rulings, Feb. 27th, 1899, and April 14th, 1899, also holding that Commissioners have no such jurisdiction (also Todd vs. U. S., 158 U. S., 278, Rice vs. Ames, 180 U. S., 371, acc.) and (*c*) because the registration provisions apply only to Chinese laborers, who were such within the United States in 1892 and 1893, and petitioner Lee Yen Tai concededly entered the United States for the first time just before his arrest in 1900 (U. S vs. Sing Lee, 71 Fed. Rep., 680–681; U. S. vs. Mark Ying, 76 F. R., 450; Treasury Decision No. 16,636, and Article V of the Treaty of 1894). This matter of registration and deportation for non-compliance was thus a

clear and distinct severable element of the Chinese Exclusion Laws (Fong Yue Ting vs. U. S., 149 U. S., at 725–726) and it was this registration procedure which was specifically recognized in Article V of the Treaty, which reads:

> "The Government of the United States having by an Act of the Congress, approved May 5th, 1892, as amended by an Act approved November 3d, 1893, required all Chinese laborers lawfully within the limits of the United States before the passage of the first named Act to be registered as in said Acts provided, with a view of affording them better protection; the Chinese Government will not object to the enforcement of such acts, and reciprocally the Government of the United States recognizes the right of the Government of China to enact and enforce similar laws or regulations for the registration, free of charge, of all laborers, skilled and unskilled (not merchants, as defined by said Act of Congress), citizens of the United States in China, whether residing within or without the treaty ports."

To the Government's contention that this is a recognition and continuance of the provisions for deportation for unlawful entry, we answer:

(*a*) The provisions China consents to are expressly described as merely those requiring Chinese laborers within the United States to register, and the whole article deals merely with registration, entry having been covered by preceding and previously drafted provisions.

(*b*) The provisions authorizing China to prescribe and enforce "similar laws or regulations for the registration" of American laborers, clearly indicate

the limits of the preceding phrase, and will scarcely be construed as American authorization of such Exclusion Laws on the part of China, as applied to American citizens.

(*c*) The treaty negotiations (considered *post*) show affirmatively that judicial proceedings for deportation for alleged unlawful entry were not to continue further, and this view is reinforced by the change of language of Article III, the certificate section, and its optional, as distinguished from its former mandatory, character.

(*d*) The language of Article V itself, in declaring that the provisions under consideration were continued "with a view of affording them ('Chinese laborers lawfully within the limits of the United States before the passage of the Act' of 1892), better protection" obviously can relate to registration provisions only, which have a relation to protecting Chinese persons, by advising the government of the names, residence and status of such persons in the United States, and can have no reference to proceedings to deport Chinese persons (laborers or *non-laborers*), and placing them *beyond* the protection of the United States. Of course all laws must be sensibly and reasonably construed (Lau Ow Bew vs. U. S., 144 U. S., 47; U. S. vs. Mrs. Gue Lim, 176 U. S., 459), and such a clause must be construed as having the meaning it bears upon its face, with regard to registration alone, and not designed to dishonestly mislead and deceive the co-contracting party.

> "In the solemn treaties between nations it can never be presumed that either state intends to provide the means of perpetrating or protecting frauds; but all the provisions are to be construed as intended, to be applied to *bona fide* transactions"

said this Court in U. S. vs. Schooner Amistad, 15 Peters, 518, 595.

Similarly this Court said, in New York Indians vs. U. S., 170 U. S., 1, 23:

> "There is something, too, which shocks the conscience, in the idea that a treaty can be put forth as embodying the terms of an arrangement with a foreign power, or an Indian tribe, a material portion of which is unknown to one of the contracting parties, and is kept in the background to be used by the other only when the exigencies of a particular case may demand it."

(e) Moreover, this contention of the Government obviously proves too much, for if the prior Acts in their entirety could be deemed to be thereby incorporated into the treaty by this language, they would render the treaty absurdly contradictory, by making it re-enact provisions inconsistent with itself, and modified by this treaty, as already pointed out in considering the conceded changes in the law made by the treaty.

(*f*) It is, however, obvious that the treaty continues in force, as it says, not the procedure provisions for unlawful entry, of the Acts of 1882 and 1884, but only the provisions of the Acts of

1892 as amended in 1893, that, in the language of the treaty "required all Chinese laborers lawfully within the limits of the United States before the passage of the first named Act to be registered as in said Acts provided." This, as this Court had held in the Fong Yue Ting case, was a severable element of the Act of 1892, being the portion of that act dealing, not with the class of persons "not lawfully entitled to be or remain in the United States," under the laws as they stood when this Act of 1892 was passed, but with the class "entitled to remain in the United States," and required by Sections 6 and 7 of that act to register (Fong Yue Ting case, at pp. 725–726).

(*g*) Hence, even in terms, the Treaty does not refer to the Acts of 1882, 1884 and October 1, 1888 (continued in force by the Act of 1892), but not part of that act, nor to Sections 2 to 4 of the Act of 1892, which provisions the Supreme Court in the last cited case (p. 725) has held only "concern Chinese 'not lawfully entitled to be or remain in the United States'" under the laws on the books on May 5th, 1892, but only to Sections 6 and 7, "the manifest objects" of which "are to provide a system of registration and identification of such Chinese laborers" (725), and similar provisions on China's part concerning Americans in China for their protection were authorized by this article of the Treaty.

(3) The Government's contention that the 5th Article of the Treaty has continued in force all the prior deportation acts, including Section 12 of the

Act of 1884, has brought it to the logical deduction, stated in its brief in the Circuit Court of Appeals, that "it is difficult to detect the least particle of conflict between the treaty of 1894 and the former Chinese Exclusion Acts, and assuredly there is nowhere a 'positive repugnancy,' nor can it be said that 'harmony is impossible.' " It is not surprising that this ignores the opinions of the Attorney-General and the everyday practice of the Government since December, 1894, to the effect that the non-return of laborers' provisions of the statute and the certificate provision for exempt classes are unquestionably modified, because inconsistent with the treaty; we have already seen that a mere comparison of the treaty with the statute discloses these inconsistencies.

The Government's contention, therefore, that Article V of the Treaty has continued all the provisions of the prior statutes in force, is obviously untenable.

(4) The principle "*expressio unius est exclusio alterius*" applies, and establishes the repeal by the treaty of the procedure provision (Section 12 of the Acts of 1882 and 1884). The peculiar applicability of this principle to treaties is recognized in the case of

Tucker vs. Alexandroff, *supra* (p. 12).

See also

U. S. vs. Rauscher, 119 U. S., 407, 420.

The provisions of former statutes and treaties, intended to be kept in force by the treaty, of those relating to Chinese immigration, are expressly

specified. Thus, see Article IV continuing in force Article III of the Treaty of 1880, Article V continuing in force the registration provisions and their enforcement, and Article III, preserving the right of entry of the classes entitled to enter under prior laws. Section 12 of the Act of 1884 not being continued or referred to in any way, was not intended to be kept alive.

POINT II.

As the Acts of 1882 and 1884 were merely designed, as expressed even in their titles, to carry out the treaty of 1880, the repeal of that treaty by the substitution for it of the treaty of 1894 effected a repeal ipso facto of the Acts of 1882 and 1884 and of their extension, except in as far as expressly continued in terms by the treaty.

The Treaty of 1880 with China (22 Stat., 826) was a consent, on China's part, to subsequent legislation by the United States restricting the immigration of Chinese laborers within definite limits; without it, such acts would have violated the Treaty of 1868 (Fong Yue Ting case at pp. 716-7). The Treaty of 1880 was not self-executing, did not by its terms exclude any Chinese person and required legislation to carry it out (compare 6 Opinions, Attys-General, 296, 750 (Cushing), Foster vs. Neilson, 2 Peters, 318; Christian vs. Eckhart, 2 Howard, 344, 375; Fong Yue Ting Case, 149 U. S., p. 720). Pursuant to the Treaty

of 1880 Congress passed the Act of 1882, entitled "An Act to execute certain treaty stipulations relating to Chinese" (22 Stat., 58, 1 Sup. R. S., p. 342), and amended this act in 1884 (1 Sup R. S., p. 458); the terms of its duration being ten years from 1882, and it was extended for ten years more in 1892 (2 Sup. R. S., 1–3). This Act of 1882 was purely auxiliary to the treaty, being designed to carry out a treaty not self-executing; accordingly, the Courts repeatedly held that it was subordinate to the treaty, and, except in as far as the intent of Congress to violate the treaty might be unmistakable, these Acts were to be construed to accord with its provisions, and so as in fact "to execute certain treaty stipulations relating to Chinese."

The title and recitals of such a statute, designed to execute a treaty which was not self-executing, are an essential and important part of the statute, and not merely nominal (Cases, *supra*, and Price vs. Forrest, 173 U. S., 410, 427; U. S. vs. Fisher, 2 Cranch., 358; U. S. vs. Palmer, 3 Wheaton, 610, 631), and they have been so regarded in this instance and effect has been given to this circumstance with respect to this very treaty (Chew Heong vs. U. S., 112 U. S., 536, 544, 549, 560; Lau Ow Bew vs. U. S., 144 U. S., 47, 62; U. S. vs. Mrs. Gue Lim, 176 U. S., 459, 462, 465). In the last cited case, the Court said (p. 462):

> "The Act of 1882, of which that of 1884 was an amendment, was passed, as is stated in its title, 'To execute certain treaty stipulations relating to Chinese,' and therefore we

> must assume that the body of the Act has that purpose." (Also p. 465, where still stronger language is employed).

But the treaty of 1880 was repealed by the treaty of 1894, every paragraph and sentence of the latter being inconsistent with the former, with the single exception of Article III of the former, which was accordingly in terms re-enacted in Article IV. of the latter (La Republique Francaise vs. Schultz, 57 Fed. Rep., 37, 40, Townsend, J.).

The relations of a statute to execute such a treaty, to the treaty itself, and the effect on the statute of the repeal of the treaty, or substitution of a new treaty therefor, are questions which have not often come before the Court. The following authorities throw light upon the subject:

In Queen vs. Wilson, L. R., 3 Q. B. D., 42, 45, Chief Justice Cockburn held:

> "I cannot entertain a shadow of doubt that in accordance with the special provision in the Extradition Act of 1870, by which Her Majesty may make the treaty and the application of the Act subject to any terms and conditions that she may think proper, the Order in Council must be co-extensive with and limited by the treaty, for otherwise our municipal legislature might be at variance with the terms which the two countries arranged between themselves—a proposition absurd upon the very face of it."

The same question is, of course, apt to arise with respect to statutes thus related to other statutes. Accordingly, we find the rule laid down in the American and English Encyclopedia of Law,

volume 23, page 155, article "Statutes" (based upon Bacon's Abridgment Statutes I, 1876 edition, vol. 9, page 223):

> "If a statute which does not itself contain any limitation is to be governed by another, which is temporary merely, the former will also be temporary, and dependent upon the existence of the latter."

In Bacon's Abridgment the authority relied upon for the proposition is *In re* Gallile, 7 Term Reports, 673, where it was held with respect to a statute upon which an action was based which required masters of ships to employ seamen in numbers depending upon the tonnage of the vessel, as disclosed by the vessel's certificate from the Custom House, that the repeal of the statute prescribing such Custom House certificate, effected the repeal of the statute relied upon. The Court said:

> "Then there is no act of Parliament now subsisting, to enable the party to procure the certificate required by the statute 6 and 7 William III., and consequently the 19th Section of that Act was temporary, as indeed were the other adjoining clauses in that Act. If the law regulating the protections is to be governed by another law which was only temporary, and no longer exists, it must also be a temporary law itself."

See also 20 Opinions Attorneys-General, 467.

With the repeal of the Treaty of 1880 in 1894, the statutes to execute it fell *ipso facto*, except in as far as the new treaty expressly in terms con-

tinued them. No judicial procedure for deportation was, in terms or even by implication, continued by the treaty, and hence the commissioner herein was without jurisdiction.

POINT III.

The U. S. Commissioner had no jurisdiction to hear or determine the case, the Procedure Provision (Section 12) of the Act of 1884 having been repealed by the treaty of 1894, which prescribed a different and optional certificate for entry, and the treaty conferred no jurisdiction by means of judicial proceedings for the deportation of persons who unlawfully entered the United States, but left the matter to the action of executive officers charged with the duty of preventing unlawful entry.

Under the Act of 1882 as amended in 1884 (1 Sup. Rev. Statutes, p. 458, Sections 6 and 12), and by the Act of October 1st, 1888 (1 Sup. R. S., p. 625), and the Acts of May 5th, 1892 (2 Sup. R. S., p. 13), and Nov. 3d, 1893 (2 Sup. R. S., p. 153), Chinese persons permitted to enter the United States were required to produce the certificate prescribed by Section 6 of the Act of 1884; the only exceptions to this rule were Chinese diplomatic officers and their households (Sec. 13, Act 1884), and non-laboring Chinese persons returning to the United States *animo revertendi* (Lau Ow Bew vs.

U. S., 144 U. S., 47, and see also pp. 52-3), and the wives and minor children of Chinese persons authorized to enter, which wives and minors have no status of their own, and to whom the certificate provisions were deemed inapplicable (*In re* Tung Yeong, 19 Fed. Rep., 184, 189, and U. S. vs. Mrs. Gue Lim, 176 U. S., 459), and applied by Treasury Department, Synopsis Treasury Decisions No. 23262, September 4th, 1901). Returning merchants were required to furnish certain evidence by means of non-Chinese witnesses by Section 2 of the Act of November 3d, 1893. Of course, citizens of the United States by birth of Chinese extraction are not excluded (U. S vs. Wong Kim Ark, 169 U. S., 649). The return of laborers was absolutely forbidden by the Act of Oct. 1, 1888 (1 Sup., p. 625).

A person in Lee Yen Tai's position, before the Treaty of 1894, could lawfully enter only by producing the certificate prescribed by Section 6 of the Act of 1884, to prove that he was not a laborer.

> "The purpose of the Sixth Section, requiring the certificate, was not to prevent the persons named in the Second Article of the Treaty from coming into the country, but to prevent Chinese laborers from entering under the guise of being one of the classes permitted by the Treaty. It is the coming of Chinese laborers that the Act is aimed against,"

says the Court in U. S. vs. Mrs. Gue Lim, 176 U. S., 459, 467. If he succeeded in entering, whether by stealth or pursuant to the ruling of executive

officers, judicial proceedings for his deportation were authorized by Section 12 of the Act of 1884, which reads (1 Sup. R. S., pp. 460–1):

> "That no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this Act required of Chinese persons seeking to land from a vessel. Any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, and at the cost of the United states, after being brought before some Justice, Judge or Commissioner of a Court of the United States, and found to be one not lawfully entitled to be or remain in the United States."

The Act of October 1st, 1888 (which was passed after the Act of September 13, 1888, which latter Act was to go into effect as to all but one of its provisions only upon the ratification of a Treaty with China, which China rejected), expressly adopted this procedure section (Sec. 12 of the Act of 1884), to apply to laborers, returning or originally entering (Sec. 3, Act of October 1, 1888, 1 Sup. R. S., p. 625), so that it is clear that at the time of the hearing of this cause below, Sec. 12 alone, if any, provision of law, conferred jurisdiction on the U. S. Commissioner to hear this cause (*In re* Chow Goo Pooi, 25 Fed. Rep., 77; Sawyer, Sabin & Hoffman, JJ.) *In re* Li Foon, 80 Fed. Rep., 881 (Lacombe, J.). *In re* Li Sing, 86 Fed. Rep., 896 (C. C. A., Shipman, J., writing); affirmed 180 U. S., 486. Hence the Circuit Court of Appeals has certified the question whether that section is still in force.

It should be observed that no reference whatsoever to the Treaty of 1894 was made by counsel in the Li Sing case, in any of the Courts, and the effect of that Treaty upon the acts there construed was never under consideration.

(1) The Treaty of 1894 (28 Stat. at L., p. 1210; 2 Sup. R. S., p. 155), prescribed a new and different certificate to be produced by Chinese applicants, and the penalties for entry without the former certificate were not continued, and fell by their own terms.

(*a*) In the passage above quoted from Sec. 12 of the Act of 1884, it was provided that entry "without the certificate in this act required" was prohibited, and a procedure for deportation by judicial orders for such unlawful entry prescribed. The treaty of 1894 has prescribed a new and different certificate, taking the place of the old one, "this act" (of 1884) no longer prescribes any certificate, and by its own language, the procedure section for entry without a superseded certificate, falls. Article III of this treaty reads as follows:

> "The provisions of this convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants or travellers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States, they may produce a

certificate from their government or the government where they last resided, vised by the diplomatic or consular representative of the United States in the country or port whence they depart."

In considering this provision, the Attorney General in 21 Opinions, 347, ruled in 1896, that Chinese persons who reside at Hong Kong must, under this treaty, produce a certificate from the British authorities there, and not from the Chinese Government, as before. He said:

"While called a convention, the document to which you refer is clearly a treaty within the meaning of the Constitution of the United States. It is, therefore, so far as its provisions are self-executing, a part of the supreme law of the land. It is my opinion that the provisions of the article under consideration are self-executing. It requires a certificate from the Government of the Colony of Hong Kong. It requires nothing more than that. Its requirements would not be satisfied by a certificate from the Government of China.

The Act of July 5th, 1884, Chapter 220, Section 6, requires that certificates in similar cases should be issued by the Chinese Government, 'or of such other foreign government of which, at the time, such Chinese person shall be a subject.' Prior, therefore, to the treaty of 1894, a certificate from the authorities at Hong Kong would have been insufficient in the cases now under consideration, and a certificate from the Chinese Government would have been necessary.

You ask my opinion whether the treaty 'waives or modifies the requirement of the Act of 1894.' As the treaty is subsequent to the statute, and as its provisions are self-executing, I am of the opinion that it does modify the requirements of the statute, so

> that the certificate must now come from Hong Kong and not from China (The Cherokee Tobacco Co., 11 Wall, 616, 621; Whitney vs. Robinson, 124 U. S., 190, 194; 13 Opin., 354)."

A certificate is required of certain persons by the treaty, being the same persons, doubtless, of whom a certificate is required under the act of 1884, Section 6 (U. S. vs. Mrs. Gue Lim, 176 U. S., 459); but the certificate now in question is a different one than before, as pointed out by the Attorney-General. It need no longer be a certificate from the Chinese Government or such other government as the applicant may have been a subject of, but may be from his government or of the government where the applicant last resided. Moreover, the certificates of persons enumerated in that article where vised by the diplomatic officers of the United States need, by the terms of the article, contain nothing more than the permission or statement of right to enter, unlike the former certificate (compare Sec. 6, Act of 1884, 1 Sup. R. S., p. 459). In the language of the Attorney-General, the treaty "requires nothing more than that."

The language of the treaty has its present shape by design, because a reference in a prior draft thereof to the certificate "required by the Act of 1884" was expressly stricken out by consent, as a result of a conference between Secretary Bayard and the Chinese Minister. (See Foreign Relations of the United States, 1888, Vol. 1, pp. 393–4, Article III.)

This change is extremely suggestive, for the word "may" was substituted for the phrase "shall

in accordance with Section 6 of the law of July 5th, 1884, of the Congress of the United States" and, after the words "produce a certificate" the words of the draft "as required in said section" were omitted. The numerous details prescribed by Section 12 of the Act of 1884 to be contained in such certificate, are, therefore, no longer necessary, not being required by this later treaty; its source is different, and the whole certificate was made permissive, not mandatory, and a partial repeal of the earlier statute was thus effected, no matter what, on other points, the proper construction of this article of the new treaty may be.

The section of the law that the government must invoke, to effect the deportation of Chinese persons who have entered the United States, establishes a procedure applicable only where the certificate "required by the Act of 1884 (Sec. 6)" is not produced. By the very terms of Section 12, entry without "the certificate in this act required" is prohibited. These provisions of the Act of 1884 being repealed, there is no longer any certificate required by any such act, and there is no right to proceed under Section 12 of the Act of 1884 for the deportation of such Chinese persons.

(*b*) The diplomatic correspondence immediately antedating the treaty shows this further, as Chinese persons objected to judicial proceedings to pass upon their rights during an unlimited period after they had entered; these objections were communicated to the American Secretary of State by the Chinese Minister, were specifically acquiesced in

by our Government, and the references to the prior certificate and its mandatory provision eliminated, thus carrying with it this procedure provision (Foreign Relations of the U. S., 1888, Vol. I, pp. 368–370, propositions 7 and 13, 371–3, 393, 398).

It should be remembered that this treaty in the form in which it was promulgated in 1894 was negotiated and signed already in 1888, except that Article V was subsequently substituted for the original Article V, as to registration of Chinese and American subjects, and a few verbal changes were made in certain articles; Article III was left absolutely unchanged. China rejected the treaty in 1888, after subsequent amendment by our Senate (p. 398), but finally adopted it in its original shape in 1894, with the inclusion of the new Article V, and it was then promulgated.

The Chinese Minister on March 18th, 1887, submitted his draft of proposed amendments, with reasons therefor, to the Secretary of State, stating (Foreign Relations, 1888, I, 368–370):

> "Chinese merchants who belong to the exempt class mentioned in the treaty, on their landing at the port of San Francisco, have been often subjected to inconveniences and troubles by being compelled to appear in Court, through the acts of the local authorities at that port, in investigating and discriminating the cases of returning Chinese laborers thereto in past years. Hereafter they should be permitted to land upon the presentation of their certificate or production of evidence or bond of security, without the necessity of going into Court for examination."

On April 11, 1887, Secretary Bayard acquiesced in this proposition (pp. 371-3), and as a result of a personal conference between him and the Chinese Minister, held in March, 1888 (p. 393), the changes in the draft above referred to, were made, eliminating judicial proceedings after entry, and the language of the present Article III verbatim was agreed upon.

The scheme adopted to reach this result was to make the certificate optional, not mandatory, and to supersede the requirement of the Act of 1884, and with it the procedure and penalty thereby established for entry without such certificate.

Reference is proper to these treaty negotiations, as evidence of the history of the times, the attending circumstances, and the evils aimed at and the purposes of the drafters of the treaty (U. S. vs. Ah Fawn, 57 F. R., 591; U. S. vs. Wong Kim Ark, 169 U. S., 649, 697–9; Dunlap vs. U. S., 173 U. S., 65, 75). Such rules apply to treaties (U. S. vs. Payne, 8 Fed. Rep., 892; U. S. vs. Perchemann, 7 Peters, 51; U. S. vs. Ah Fawn, *supra*).

(2) The treaty of 1894, Article III, contains a directory provision for a certificate, but does not provide any penalty or procedure for deporting persons who have entered without it.

It is obvious that this provision is directed to the administrative officers of the Government, the various Treasury and Immigration officers charged with the duty of enforcing these laws and prohibiting the entry of Chinese persons into the country.

This is in line with the simultaneous and subsequent action of Congress, investing them with exclusive jurisdiction over such matters, and divesting the Courts thereof, in cases of applications by aliens to enter, even to review their actions (Act of 1894, and later acts, considered in Lem Moon Sing vs. U. S., 158 U. S., 538; Williams vs. U. S., 168 U. S., 382, 387–8; U. S. vs. Jacobus (C. C. A., Wallace, J., writing, still unreported, quoted *post* (p. 46).

The two Governments were willing to rely upon this administrative system for enforcing the laws, and did not chose to provide for any procedure involving imprisonment and other hardships, with respect to persons who have entered the country. A prior procedure section, like Sec. 12, for enforcing a provision of a statute, does not apply, to carry out a subsequent, different, treaty provision. In this aspect of the case, the argument for the government is much weaker than the one made by it under the Custom Laws in Bartram vs. U. S., 77 Fed. Rep., 604, where it was held by Judge Wheeler that where regulations were prescribed by the Treasury Department under one law, and subsequently another was passed, using similar language, but requiring regulations to be promulgated to enforce it, the former regulations are inapplicable.

As said by Judge Wheeler in that case:

> "Proof under this paragraph of the act of 1894 was to be made under general regulations 'to be prescribed by the Secretary of the Treasury' in the future, and prior regulations

would not apply. None had been made under this paragraph at the time of these importations, and therefore none applicable were then in force."

See accordingly

In re Kearns, 64 Fed. Rep., 481.
In re Kinney, 102 F. R., 468,

involving oleomargerine and the general internal revenue laws. These rulings are in accord with decisions of this Court in which procedure and penalty provisions of one act were held inapplicable to subsequent statutes, in the absence of language expressly adopting them.

U. S. vs. Paul, 6 Peters, 141.
Farmers' Bank, vs. Dearing, 91 U. S , 29, 35.
Barret vs. Munsie Bank, 98 U. S., 555.
McBroom vs. Scottish Co., 153 U. S., 318, 325.
U. S. vs. Gillmore, 8 Wall, 330.

The applicability of this principle to treaties was just declared in Tucker vs. Alexandroff, *supra*.

Nor is it reasonable to suppose that when the two nations entered into a national compact, concedely changing the municipal law of the one in various matters, they intended to keep in force, as part of this new international compact, provisions of the municipal law of the one country, in no way referred to in the compact. Whatever may be the rule of construction as to continuance of prior procedure

provisions as to statutes, no such presumption can reasonably be resorted to as to treaties between sovereign nations.

Closely in point as to this discussion is the decision of the Supreme Court in the case of

The Amiable Isabella, 6 Wheaton, 1,

where the question was presented whether any effect could be given to the treaty with Spain, referring to a form of passport as annexed to the treaty, when, in fact, the form was omitted. This Court, Judge Story writing, held that this provision must be treated as absolutely nugatory and unenforcible. He said:

> "Can this Court annex a form to the treaty? Can it supply the deficiency of the treaty, and give effect to it in the same manner as if no form were referred to." * * * We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualifications or integral part of any stipulation, upon any notion of equity or general convenience, or a substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties, and whether they belong to the essence or the model parts of the treaty, equally give the rule to judicial construction. The same powers which have contracted are alone competent to change or dispense with any formality."

(3) The certificate is no longer mandatory or exclusive.

An examination of the Treaty of 1894 shows clearly that only the immigration of Chinese la-

borers is prohibited. Article I so provides. Article III, which enumerates some (though not all) of the classes coming to the United States privileged to enter, is not mandatory, even in form, as to the production of a certificate by non-laborers. It merely provides that "to entitle such Chinese subjects as are above described to admission into the United States, they may produce a certificate." The suggestive change in the draft of the treaty has already been referred to, pursuant to which the words "shall in accordance with Section 6 of the law of July 5, 1884, * * * produce a certificate as required in said section" were replaced by the permissive language under consideration. In the light of this circumstance, the contention made by the Government in the Gue Lim case (176 U. S., 459) brief, that "may" here means "must," is obviously untenable. But even without reference to the treaty negotiations, the same conclusion should be reached. While it is true that in our statutes, the technical term "may" sometimes should be construed as "must," this Court has determined that principle to be inapplicable to treaties.

As held by the Court in Geofroy vs. Riggs, 133 U. S., 258, 271:

> "It is a general principle of construction with respect to treaties that they shall be liberally construed so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction, words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local

> law, unless such restricted sense is clearly intended. And it has been held by this Court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it, and the other favorable to them, the latter is to be preferred."

In Lau Ow Bew vs. U. S., 144 U. S., 47, 62, the Court said:

> "There can be no doubt, as was said by Mr. Justice Harlan, speaking for the Court in Chew Heong vs. U. S., 112 U. S , 536, 549, that since the purpose avowed in the act was to faithfully execute the treaty, any interpretation of its provisions should be rejected which imputed to Congress an intention to disregard the plighted faith of the Government, and consequently the Court ought, if possible, to adopt the construction which recognized and saved rights secured by the treaty."

This principle requires, accordingly, a holding that "may" in Article III, of this treaty is permissive and not mandatory (U. S. vs. Thoman, 156 U. S., 359; Minor vs. Mechanics Bank, 1 Peters, 46, 63-4; The Mary N. Hogan, 17 Fed. Rep., 814; approved in the Three Friends, 166 U. S., 1, 67) in accordance with the treaty negotiations; that, accordingly, the mandatory provisions for a certificate under Sections 6 and 12 of the Act of 1884 have been superseded, and such certificates have become optional, and that hence persons can no longer be excluded as laborers, because not shown by the statutory certificate to be non-laborers, a view greatly strengthened by the fact that the treaty of 1894 (Article 1) excludes only "Chinese laborers," while Article III, is directory only, not

mandatory, and contains no words of exclusion, and the purpose of the treaty is recited to be the exclusion of laborers only.

The language of this Court in U. S. vs. Jung Ah Lung, 124 U. S., 621, showing that Section 4 of the Act of 1882 prescribed a certificate which was not mandatory or exclusive, directly applies to the similar language of this treaty, Article III. This Court said:

> "The section (Sec. 4) then says: 'The certificate herein provided for shall entitle the Chinese laborer to whom the same is issued to return to and re-enter the United States, upon producing and delivering the same to the collector of customs of the district at which such Chinese laborer shall seek to re enter.' It does not say that such certificate shall be the only evidence permissible to establish the right of re-entry. It merely says that it shall be given for the purpose of properly identifying the laborer, and shall be proper evidence of his right to go from and come to the United States, and shall entitle him to return to and re-enter the United States, upon producing and delivering it to the collector of the district at which he shall seek to re-enter. It does not say that the Chinese laborer returning by a vessel shall not be permitted to enter the United States without producing the certificate. In this respect there is a marked difference between Section 4 and Section 12 of the same Act, in regard to a Chinese person entering the United States by land. Section 12 provides that no Chinese person shall be permitted to enter the United States by land without producing the certificate mentioned in Section 4 of the Act. This difference of language is very marked."

Hence, in the treaty in question, the language of Section 12 was discarded by the drafters of the

treaty with this decision before them; and language like that just held to be permissive and not mandatory, was employed instead, by express alteration of the original draft. This Jung Ah Lung case was decided on February 13th, 1888, just a few weeks before the changes in the draft of Arficle III of the Treaty were made, in March, 1888 (Foreign Relations 1888, I. p. 393.

Article III was not altered or modified, by being made exclusive, either in 1888 or 1894.

It is also important to note that the same difference between permissive and mandatory language, noted in this decision between Sections 4 and 12 of the Act of 1882, is found in the Treaty of 1894 between Articles II (last sentence) and III. Unlike Article III, the second article as to returning laborers, provides: "And no such Chinese laborer shall be permitted to enter the United States by land or sea without producing to the proper officer of the customs the return certificate herein required." This was a Senate amendment to the draft in March, 1888, adopted in consequence of this same decision.

Moreover, the treaty marks an entire change of policy with respect to entry by land of Chinese persons. The Acts of 1882 and 1884 (Section 12), provided that "no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this Act required of Chinese persons seeking to land from a vessel." The certificate required of Chinese persons "seeking to land from a vessel" herein referred to, is the one, as expressly

held by this Court in the above entitled case of Jung Ah Lung, "mentioned in Section 4 of the Act," the certificate exacted of returning laborers. The result is that under the acts of 1882 and 1884, Chinese non-laborers were not permitted to enter by land at all. Of course, returning non-laborers and their children (Lau Ow Bew vs. U. S., 144 U. S., 47; U. S. vs. Mrs. Gue Lim, 176 U. S., 459) and Chinese born here, were not thus dealt with. In the treaty, a new policy was adopted, reference to the certificates of the Acts of 1882 and 1884 were expressly elimina'ed, and non-laborers permitted to enter anywhere, by land or by sea.

That the certificate was not designed to be mandatory under the treaty is further apparent from the Chinese Minister's proposition, acquiesced in by our Government and quoted *supra* (p. 32) as leading up to the change in the draft of the treaty, that hereafter Chinese merchants should be admitted upon presentation either "of their certificates or production of evidence or bond of security."

Nothing inconsistent with this was held in the Gue Lim case, 176 U. S., 459, relied on by the Government. In that case the question was presented whether the wives and children of Chinese merchants domiciled in the United States were required to produce a certificate to enter. The Court below held that they were not, and on the Government's appeal to this Court, there was no appearance for appellees. The Government contended in its brief that the words "may" in this Article III means "must," and that, whether defendants, under the Act of 1884, were or were not

required to produce a certificate, the new treaty provision made certificates mandatory. But this Court, in the light of the language of Article III, as to "the right at present enjoyed by Chinese subjects," said:

> "It is contended on the part of counsel for the Government that by the subsequent treaty of March, 1894, 28 Stat., 1210, the two Governments have agreed that the requirements of a certificate as provided for in the Sixth Section of the Act of Congress shall apply to all permitted Chinese subjects, who must, without exception, produce such certificates. Article Two of the Treaty of 1880 and Article Three of the Treaty of 1894 are set out in margin.
>
> "We do not think the treaty of 1894 alters the result flowing from the treaty of 1880 and the Act of 1884. The question is whether under the Act of 1884, construed in connection with the Treaty of 1880, the wife of a Chinese merchant, domiciled in this country, may enter the United States without a certificate, because she is the wife of such merchant.
>
> "Although the third article of the treaty of 1894 does speak of certificates for Chinese subjects therein described, who already enjoy the right to enter the country, the question recurs whether the certificate of the husband who himself enjoys the right is not enough for the wife, the fact being proved or admitted that she is such wife. Possibly the result of the treaty of 1894 may be held to be, instead of simply prohibiting the entrance of Chinese laborers, to restrict the right of entry to those classes who are specially named in the third article of the treaty. But the question would still remain whether the wives of the members of the classes privileged to enter, were not entitled themselves to enter by reason of the right of the husband and without the certificate mentioned in the Act of 1884."

(4) In any event, even if there was no such intention on the part of Congress, it is not competent for the Courts to supply supposed defect and gaps in legislation, particularly not where such proposed additional legislation would be such a gross violation of individual liberty and personal rights. The language of the Court in the recent case of U.S. vs. Goldenberg, 168 U. S., 95, is here applicable:

> "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he uses. * * * The Courts have no function of legislation, and simply seek to ascertain the will of the legislature. * * * No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify judicial addition to the language of the statute * * * Under these circumstances all that can be determined is that Congress has not specifically provided that payment shall be made within ten days as one of the conditions of challenging the action of the collector, and hence there is no warrant for enforcing any such condition."

See acc. The Amiable Isabella, quoted *supra* (p. 36).

This argument is strengthened by consideration of the fact that Congress, immediately after this treaty was signed in 1888, passed the Act of September 13th, 1888, to carry out its provisions, including a procedure provision, thus clearly recognizing that neither the treaty itself nor earlier provisions were regarded as still in force. But China rejected the treaty, upon whose ratification the act was dependent (Li Sing vs. U. S., 180 U. S., 486) and the Act of October 1st, 1888, was passed instead. Later, when the treaty (with the fifth ar-

ticle added) after its signature on March 17th, 1894, was ratified in 1894, Congress enacted no such procedure provisions, but passed the Act of 1894 (28 Stat. at L., p. 390), making the action of treasury officials excluding aliens final. Hence there is a gap in existing statutes as to procedure for deportation, designed or accidental. Design may be found, apart from the Treaty Negotiations, also from the language of Article IV of the Treaty of 1894, affording Chinese persons for the protection of their person and property, all the rights of the most favored nation except the right to become United States citizens by naturalization. This may well have been designed to put an end to the barbarous and inhumane deportation proceedings China had complained of, in which Chinese persons were being arrested on complaints not under oath, charged with having entered the United States unlawfully, though they may never have been outside of the country, or may many years before have been admitted by the customs officials, and required to meet the burden of proof by establishing "by affirmative evidence" to the "satisfaction" of some bigoted petty magistrate, their right to remain here.

POINT IV.

The subsequent legislation of Congress does not evince any intent to continue judicial proceedings for unlawful entry.

It is contended by the Government that subsequent statutes, enacted since the Treaty of 1894

was proclaimed, evince a legislative intention to continue the deportation procedure for unlawful entry. In passing, we may observe that such subsequent legislative intent, even if it could be found, could scarcely be regarded as binding upon or an admission by China, a co-ordinate party to the treaty. Moreover, it is obvious that the Act of March 3d, 1901, relied on by the Government, has nothing to do with this case, because passed long after this case was decided by Judge Brown, and in large measure to meet this very contention. The other statutes are all irrelevant to this discussion, being mere appropriations for the exclusion and deportation of Chinese persons.

It is not contended by appellee that the various statutes passed at the time of the ratification of the treaty and since, do not furnish ample authority for the exclusion upon attempted entry of Chinese laborers by executive action. Moreover, appropriations were proper, and may possibly be authorized by these statutes, for the deportation, even by judicial procedure, of Chinese laborers convicted of not registering, pursuant to Section 6 of the Acts of 1892 and 1893 and Article V of the Treaty of 1894.

In fact, however, further consideration of these appropriation act provisions becomes unnecessary, because the Courts have decided expressly that these provisions are inapplicable to judicial proceedings. The precise point was raised in the case of Jacobus vs. U. S., decided by the Circuit Court of Appeals on July 16th, 1899, but not

yet reported. In that case the Government contended that these provisions (as found on the statute books before the treaty of 1894, but identical with those the Government invokes) applied to deportations under judicial proceedings, and limited the compensation of the U. S. Marshal for his services in executing these warrants, to "actual expense of conveyance of Chinese persons to the frontier or seaboard for deportation," pursuant to the express terms of the statutes, which are sections, however, in appropriation acts under the heading "Miscellaneous Objects under the Treasury Department." The Court (Wallace, J., writing) overruled this contention, however, and held:

> "In executing warrants for deportation of Chinese persons, the marshals of the United States are not in any sense agents or subordinates of the Treasury Department; they are enforcing judicial process as the officers of the Court. We think that their compensation is to be paid out of the regular judicial appropriations. As Congress had entrusted the general supervision of the Chinese Exclusion Laws to the Secretary of the Treasury, entailing expenses upon that department, it was proper and necessary that the expenses of that department should be provided for by an appropriation. In our opinion the appropriation act in question is merely intended to provide for the expenses of the Treasury Department, and the actual expense of conveyance therein mentioned refers to the expenses which may be incurred by that department, and can have no application to the expenses which are incurred by other departments of the government."

The government has acquiesced in this decision, withdrew its appeal therefrom, and the

ruling is directly in line with a decision of the Supreme Court, construing the same provisions in collateral proceedings (Williams vs. U. S., 168 U. S., 382, 387–8).

As regards the Act of March 3d, 1901, authorizing United States Attorneys to designate the United States Commissioner to hear these causes, including cases of unlawful entry (31 Statutes at Large, p. 1093), it has already been observed that this Act was passed long after the Lee Yen Tai proceedings arose, so this statute is wholly irrelevant to the present discussion, and the question need not be here further considered whether this statute is not inconsistent with the Constitution, because vesting the appointment of the Commissioner to hear each particular cause in officers other than those authorized by the organic law (Article II., Sec. 2, Subd. 2), and contrary to due process of law and the separation of governmental powers, because enabling the prosecuting officers to improperly influence or coerce Commissioners, by withholding such causes and compensation from Commissioners who do not do the bidding of the particular executive officers.

POINT V.

The Government's claim that appellee's contention would deprive the Chinese Exclusion Laws of all force is erroneous as well as irrelevant.

Under the construction herein contended for, the Non-Registration provisions would stand, and

exclusion by executive action for attempted unlawful entry would also continue. It requires no argument to show that the great majority of Chinese cases are now thus dealt with, and that this system of executive action has been found quite adequate as a method of enforcing the Immigration Laws, other than the Chinese. In fact Article IV of the Treaty, giving Chinese all the rights of the most favored nation, except the right to become citizens by naturalization, may itself be invoked as sufficient authority for terminating this barbarous Chinese Exclusion system, which is wholly *sui generis* and not in vogue as to any other nation, more or less "favored." (See cases in which effect has been given to this provision of the treaty, *In re* Quong Woo, 13 Fed. Rep., 229, 233, Field, J.; *In re* Ah Chong, 2 Fed. Rep. 733, 737–9; *In re* Parrot, 1 Fed. Rep., 481, 485, 498; Yick Wo vs. Hopkins, 118 U. S., 356, 368, 369; U. S. vs. Wong Kim Ark, 169 U. S., 649, 702. See also Storti vs. Mass., 183 U. S., 138).

The contention here advanced does not strike at the exclusion of Chinese laborers by executive action. It is merely a contention that the barbarous deportation procedure by judicial action has been superesded, under which no Chinese persons' rights are safe from attack in this country from the charge of unlawful entry, no matter how long he may have been here before his arrest within this country, with resulting imprisonment, reversal of burden of proof, denial of jury trial and oppressive hearings before bigoted petty magistrates.

Moreover, further safeguards may be found in the criminal provisions of the Exclusion Laws against bringing Chinese persons into the United States unlawfully.

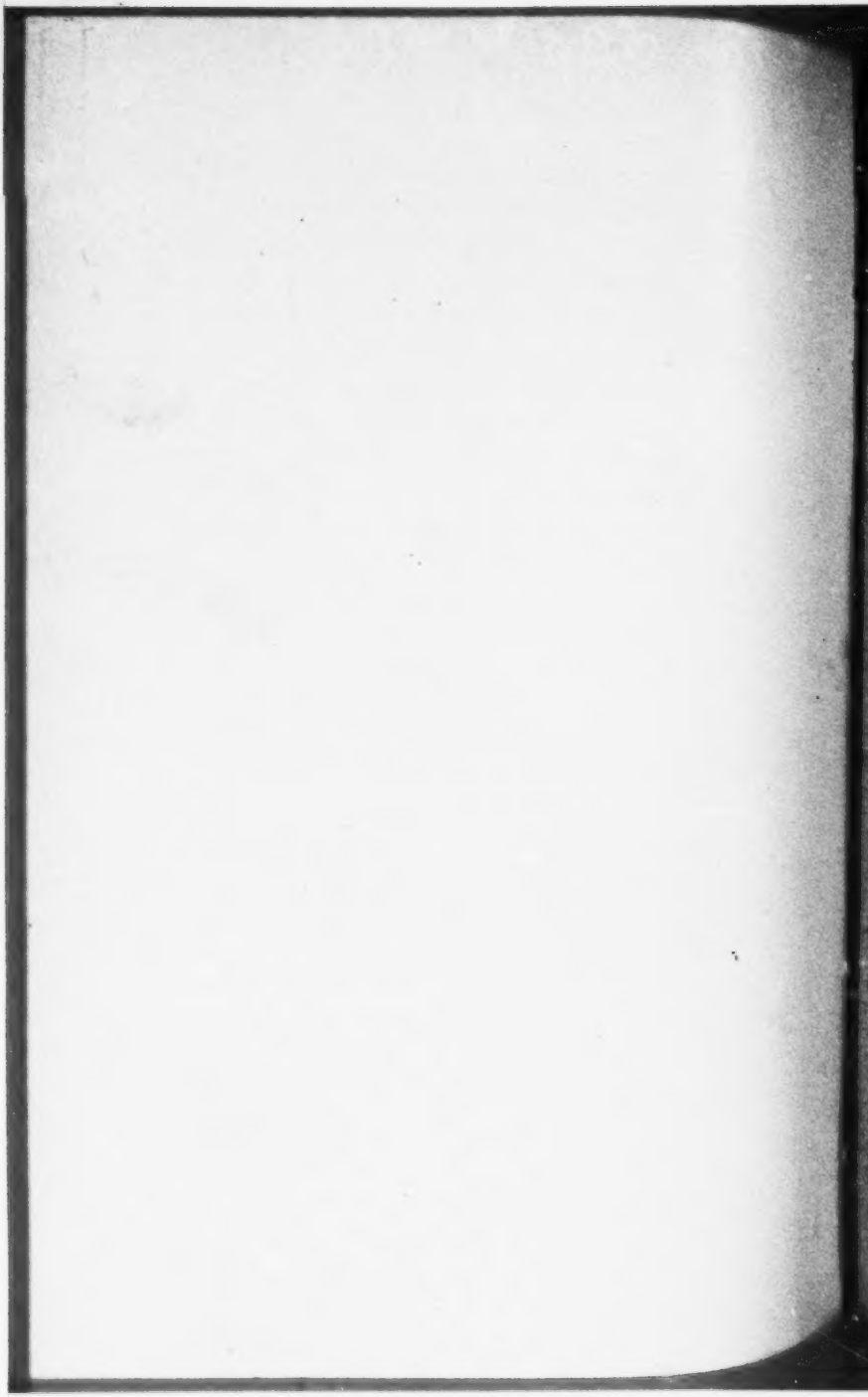
In addition, it may be observed that, if the Act of March 3d. 1901. be valid, it may authorize deportation by judicial proceedings in cases thereafter instituted, though its authorization as a procedure section is even far more meagre and vague than Section 12 of the Act of 1882 and 1884, which was severely criticized for this reason (*In re* Chow Goo Pooi, 25 Fed. Rep., 77, Sawyer, Hoffman and Sabin, JJ.).

POINT VI.

The question certified should be answered in the affirmative.

Respectfully submitted,

B. Lewinson,
Max J. Kohler,
Of Counsel.



No. 525 & 526.

Supreme Court of the United States.

OCTOBER TERM, 1901.

Brief of Lewinson for Appellants

Office Supreme Court U. S.
FILED
JAN 27 1902
JAMES H. MCKENNEY,
Clerk.

CHIN BAK KAN,
Appellant,
vs.
THE UNITED STATES.

No. 525.

CHIN YING,
Appellant,
vs.
THE UNITED STATES.

No. 526.

Filed Jan. 27, 1902.

BRIEF FOR APPELLANTS IN OPPOSITION TO MOTION TO VACATE ORDER FOR BAIL.

B. LEWINSON,
MAX J. KOHLER,
Of Counsel for Appellants.

NEW YORK:
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1902.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1901.

CHIN BAK KAN, Appellant, vs. THE UNITED STATES.	No. 525
CHIN YING, Appellant, vs. THE UNITED STATES.	No. 526

On appeals from the District Court of the United States for the Northern District of New York.

Brief for Appellants in Opposition to Motion to Vacate Order for Bail.

This is a motion to vacate orders authorizing defendants-appellants to give bail in the sum of $500 each, made by Mr. Justice Peckham on October 1st, 1901, after allowing these appeals to this Court, in cases arising under the Chinese Exclusion Acts. Defendants were charged before a U. S. Commissioner under Section 12 of the Act of

1884 (23 Stat., 115), with being Chinese persons who had entered the United States unlawfully, and the Commissioner ordered their deportation, which order was affirmed by the District Court. Direct appeals were taken to this Court because treaty and constitutional questions are involved (U. S. vs. Mrs. Gue Lim, 176 U. S., 459; U. S. vs. Wong Kim Ark, 169 U. S., 649; Lem Moon Sing vs. U. S., 158 U. S., 538; Fong Yue Ting vs. U. S., 149 U. S., 698; Lau Ow Bew vs. U. S., 144 U. S., 47, 58).

The Government's motion papers concede that the merits of these cases are not presented for consideration upon the present motion, but only the question of the authority to allow bail; counsel for appellants join the Government in seeking a determination of this question.

In view of the concession by the Government that the merits of the appeals are not presented upon the present application, appellants reserve until the argument discussion of the merits, and will not now enter into a consideration of various unwarranted assumptions made by the learned counsel for the Government in Point I of the brief for the United States, nor upon efforts to refute various propositions of law there stated, believed by counsel to be erroneous. Let it suffice for present purposes to point out that these cases raise the question whether the U. S. Commissioner had jurisdiction to order defendants' deportation, in view of the asserted repeal by implication of the procedure Statute (Sec. 12 of the Act of 1884), by the Treaty between the United States and China of 1894. This point is also raised in the case of United States vs. Lee Yen Tai, in which, in habeas corpus proceedings, Judge Addison Brown sustained the contention made by these appellants in the U. S.

District Court for the Southern District of New York, and the point was deemed so serious and doubtful that on the Government's appeal it was certified to this Court by the Circuit Court of Appeals for the Second Circuit. Besides a passing reference, not bearing upon procedure, in the case of U. S. vs. Mrs. Gue Lim, 176 U. S., 459, this was the first occasion on which the Treaty of 1894, with its marked changes in our policy of dealing with Chinese persons, came before the Courts, and the question was never before raised in the Courts, much less decided. It is not claimed that exclusion by executive action is no longer authorized, but merely that the Treaty of 1894 abolished the system of deportation by judicial procedure of alleged Chinese persons charged to have unlawfully entered the United States, *thus assimilating the practice in these cases to that in vogue as to all other aliens coming here under restrictions.* That such was the purpose of the Treaty is clearly expressed in the diplomatic correspondence between the two countries attending its negotiations. The cases further present on the merits the question whether the inadequate complaints herein were sufficient to confer jurisdiction on the U. S. Commissioner (compare Rice vs. Ames, 180 U. S., 371), whether Article IV of the Treaty of 1894 has not repealed the Section throwing the burden of proof in these cases on the defendants (Section 3 of the Act of May 5th, 1892), whether that statute is not unconstitutional in requiring persons, whether "Chinese persons, or persons of Chinese descent" claiming to be citizens of the United States by birth (U. S. vs. Wong Kim Ark, 169 U. S.), to establish "by affirmative proof, to the *satisfaction*" of an inferior magistrate like a U. S. Commissioner, holding no court of record, their "lawful right to remain in the United States," and various other questions.

But the present motion is designed to raise merely the legality of the order for bail. When there were judicial proceedings pending against Chinese persons charged with being in the United States unlawfully, by reason of an unlawful entry, bail seems to have been freely allowed in scores of cases, and the right was never even challenged until about April, 1901. Bail was allowed in every one of the cases hereinbefore cited, carried to this Court on appeal, and in many other cases in the lower Courts. The Courts found no difficulty in ascertaining what amounts would suffice to ensure defendants' presence, $300 and $500 bail was found ample in cases of unsuccessful appeals in scores of these cases, and the Government's assumption that the giving of bail is a mere cover for an escape is utterly unwarranted in fact, and is an argument applicable, with even greater force (such as it is) against bail in any criminal case, because of the greater temptation. The two express statutory prohibitions (pp. 12, 14, *post*) upon taking bail in certain classes of cases under the Chinese Exclusion Laws were recognized in the cases to which they were applicable, but were treated, during many years' experience, as without bearing upon classes of *cases like these*, in which persons actually within the United States were arrested in judicial proceedings for their deportation under the Chinese Exclusion Laws, charged with unlawful entry into the United States, and had sued out the appeals the law grants them to maintain their rights. Early in April, 1901, the United States Attorney for the Northern District of New York, first, on behalf of the Government, seems to have conceived of the idea of endeavoring to curtail the right to bail by judicial construction, and thus to make these laws much more oppressive than they had been theretofore.

Accordingly, motions were made before the Circuit Court of Appeals for the Second Circuit in two cases to vacate the orders authorizing bail in the sum of $300 to be taken, and these Government motions, after extended argument, were denied on technical grounds, not involving the merits (U. S. vs. Lee Yen Tai, 108 F. R., 950, C. C. A; U. S. vs. Moy Yee Tai, 109 F. R., 1, C. C. A.).

In the interim, the same government officer made a similar motion before Judge Addison Brown in the case of U. S. vs. Du Shen Tau; the opinion of that learned Judge, denying the Government's motion, May 3d, 1901 (not yet reported), is printed in full *post* (p. 21), and recognizes specifically the common and unbroken custom theretofore prevalent to take bail in such cases, and that the alleged statutory prohibitions invoked by the Government were not regarded as applicable.

Since then various Judges, including Judge Wheeler, who sat in the Circuit Court of Appeals when the above cited Lee Yen Tai and Moy Yee Tai motions were argued, have taken bail. On the hearing on the merits in the Lee Yen Tai case in the Circuit Court of Appeals, the Government did not see fit to renew its attack on the order for bail, but withdrew that motion, probably because an adverse decision was feared.

Counsel, on applying to Mr. Justice Peckham to allow the present appeals, sought to be taken direct to this Court because treaty and constitutional questions were involved, acquainted him with the precise condition of the controversy, and Mr. Justice Peckham, after reading Judge Brown's opinion in the above cited case of Du Shen Tau, determined to follow it, fixed the amount of bail at $500 and authorized any U. S. Commissioner within the Second Circuit to take such recognizance. (Compare Hudson vs. Parker, 156 U. S., 277.)

These are the orders now sought to be vacated by the Government. It is not understood, and certainly not contended even in the Government's Brief herein, that it has ever before been held in any Federal Court, that bail in this class of cases of appeals in judicial proceedings for alleged unlawful entry of Chinese persons actually here, is unauthorized.

POINT I.

The right to bail in this class of cases was freely recognized by the Courts before the Acts of 1892 and 1893, and has been since then also, and is authorized by law.

The right to bail while legal proceedings are pending is an inherent right, safeguarded by the Federal Constitution. Possibly, as applied to deportation of conceded aliens, it may be constitutionally abridged for a short period by Congress (but see Point V, *post.*), but, as more fully shown hereinafter, no legislation has curtailed the right in the class of cases here involved; but Congress, recognizing the existing general right, has, by special provisions, abridged it only in certain classes of cases not here involved. If express statutory authority for bail be needed, it is to be found in the general provisions of R. S., 716, as to authority to issue all necessary writs and process, and the more specific provisions of R. S., Sec. 945, authorizing bail in all civil cases, and Sections 1014 and 1015, and Rule 36 of the Rules of this Court, applying to criminal cases (Hudson vs. Parker, 156 U. S., 277). In habeas corpus cases it is covered by specific special provisions (R. S., Sec. 765, and Supreme Court Rule 34).

These causes are either criminal or civil, within the meaning of these alternative provisions. In discussing the non-registration proceedings, this Court has said (Fong Yue Ting vs. U. S., 149 U. S., 698, 728):

> "When in the form prescribed by law, the executive officer, acting on behalf of the United States, brings the Chinese laborer before the judge, in order that he may be heard, and the facts upon which depends his right to remain in the country be decided, a case is duly submitted to the judicial power, for here *are all the elements of a civil case*—a complainant, a defendant and a judge,"

apparently recognizing their character of civil suits, within the meaning of such sections as R. S. 945. If the same case be regarded as authority for the view that, under some sections, they are not criminal proceedings, still they may be so held under others (U. S. vs. Zucker, 161 U. S., 475; Wong Wing vs. U. S., 163 U. S., 228), as was held for purposes of fixing the fees in these cases of U. S. Marshals (Jacobus vs. U. S., July 16, 1899, C. C. A., Sec. Circ., still unreported) and for determining the right to require defendants to testify in these cases (Ex. p. Sing, 82 Fed. Rep. 22 (Coxe, J.); Sec. 860; Boyd vs. U. S., 116 U. S., 616; Lees vs. U. S., 150 U. S., 476).

But whether civil or criminal, the 8th Amendment to the Constitution of the United States is general in its application, in providing that "excessive bail shall not be required," and, it is submitted, *forbids total denial of bail* (see Point V. *post.*).

The right to give bail in Chinese exclusion cases during the pendency of legal proceedings was repeatedly declared by the Courts prior to the acts of 1892 and 1893, has been constantly

recognized since then in the class of cases here involved, and does not appear to have been even questioned until these groups of appeals were allowed.

In the case of The Unused Tag, 21 F. R., 701, 706, Judge Sawyer held:

> "When the body (of Chinese applicants to land in habeas corpus proceedings) is produced in Court the petitioner is, for the time being, in the custody of the law, and he can be temporarily committed to the custody of the party producing him, if deemed safe to do so, or committed to the custody of the Marshal, or admitted to bail until the lawfulness of the detention can be inquired into and determined."

In the case of *In re* Chow Goo Pooi, 25 Fed. Rep., 77, the U. S. Circuit Court for the District of California (Sawyer, Hoffman & Sabin, JJ.), held in 1884, with respect to the right of a Chinese applicant for admission into the United States in habeas corpus proceedings:

> "When his body, in obedience to the writ, is produced in Court, we are also of opinion that the control of his body remains with the Court, and that he may be committed to the custody of the marshal, or be held to bail to await the decision of the Court."

Furthermore, in that case, in discussing the question whether the procedure section here involved authorizes, in spite of its vague language, a judicial hearing and, after final decision, the right to keep Chinese defendants in custody or to bail them, it was said:

> "We therefore hold, though not without some hesitation, that the act does by implication confer upon the justice, judge or commissioner the right, after having determined that the person is not entitled to be or remain

> in the United States. to commit him to the custody of the Marshal, or to hold him to bail for a reasonable time, until the President's direction can be had."

The doubt was as to the right to have the Court detain the prisoner in such cases or to bail him, while the Act (Sec. 12 of the Act of 1882 before its amendment in 1884), provided for deportation by direction of the president, no appeal or other legal proceedings in the cause being pending.

In the case of the Chinese Wife, 21 Fed. Rep., 808, the question was presented as to the right to bail Chinese petitioners in habeas corpus proceedings, after final orders of deportation had been made in those proceedings, until the departure of the deporting vessel, no appeals or other legal proceedings being pending. (In fact, at this time, no such appeals could be taken, as Section 764, Rev. St., had not yet been amended by the Act of March 3d, 1885 (23 Stat., 437) so as to allow appeals from the Circuit Court in habeas cases generally). Justice Field denied the right, while Judges Sawyer, Hoffman and Sabin concurred in maintaining it. Under the statute, the presiding justice's decision was binding, but the difference of opinion between the judges was certified to this Court, but not decided, because in the interim, petitioner had been deported (Cheong Ah Moy vs. U. S., 113 U. S., 216).

Judge Sawyer, on behalf of himself and the two concurring judges, said:

> "When the body of a petitioner is produced in Court, on the return to a writ of habeas corpus, the petitioner is in the control of the Court. Pending the proceeding to determine her rights, the Court can temporarily and provisionally commit the petitioner to the party detaining her, if deemed safe and proper to do so, or may commit her to the

> custody of the marshal, or may admit her to bail. In either case she is in the custody of the law. When an order to remand has been made, and the petitioner placed in the custody of the marshal for the purpose of executing the order to remand, she is still in the custody of the law, and under the control of the Court till the order to remand has been finally executed. The marshal is but the executive arm of the Court, and while the petitioner is still in his custody, by reason of the order to remand not having been fully carried out, both she and the marshal are under the control of the Court; and *the Court, in my judgment, has jurisdiction and authority to admit to bail during any further necessary detention or any unavoidable delay which prevents an immediate execution of the order to remand.* In my judgment the admission to bail under such circumstances and for such purpose would not, in contemplation of law, be a landing of the petitioner contrary to the provisions of the Chinese restriction act."

It will be observed that all the judges in these cases concurred in the question as to the right to bail while legal proceedings were pending, the dissent being only in cases of application for bail *after* non-reviewed final decision, when the Court might be regarded as *functus officio*. Nor, conceding the question of power, did Mr. Justice Field dissent from the concluding paragraph of the opinion of his associates, as follows:

> "*Conceding the power of the Court to admit the applicant to bail under the circumstances stated, I think it would be a great hardship, not to say a gross violation of her personal rights, to refuse it upon security satisfactory to the Court.* I think she should be admitted to bail."

This language is precisely in accord with the language of Mr. Justice Gray, speaking for this Court as to right to bail in criminal appeals, in the case of Hudson vs. Parker, 156 U. S., 277, 285. This Court said in that case:

> *"The Statutes of the United States have been framed upon the theory that a person shall not, until he has been finally adjudged guilty in the Court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail not only after arrest and before trial, but after conviction and pending a writ of error."*

It is submitted that this principle applied equally to persons whose only crime is the color of their skin.

All these Chinese cases involved attempts at landing by means of habeas corpus, and release on bail therein, and it was uniformly held that the Court, in the absence of statutory provisions, could bail Chinese persons during the pendency of legal proceedings involving them. *A fortiori* was bail permissible where persons actually found in the country (and who may be merchants or citizens, who never left the country), were arrested here in judicial proceedings instituted by the Government for their deportation on a charge of alleged unlawful entry, and the element of securing admission into the country by means of judicial machinery was absent, and there was no final, non-reviewable decision against them.

In fact, the practice has long existed in favor of allowing bail pending appeal in these cases, even after a final order of deportation. This is clearly indicated by Judge Brown's opinion in the Du Shen Tau case (see Point IV), (though he wrote guardedly, as the question was then before an appellate Court) and to counsel's knowledge, all

of the following Judges in the Second Circuit have allowed bail on appeal after order of deportation: Judges Lacombe, Brown, Thomas, Wheeler and Adams. It was allowed, as disclosed by the Records on Appeal, in the following cases which were before the Supreme Court: *In re* Li Sing (180 U. S., 486, and below), U. S. vs. Pin Kwan; U. S. vs. Pin Yik; U. S. vs. Mrs. Gue Lim, 176 U. S., 459; U. S. vs. Wong Kim Ark, 169 U. S., 649, 652. It was allowed by Judge Lacombe in cases brought to this Court entitled *In re* Li Sing, 180 U. S., 486, and *In re* Charley Leung, 86 F. R., 303, and in other cases in other districts. No case to the contrary is even claimed to exist. *Such long practical construction without objection even by Governmental executive officers is itself entitled to great weight* (Pennoyer vs. McConnaughy, 140 U. S., 1, 23; U. S. vs. Railway Co., 148 U. S., 562).

POINT II.

The prohibition of Section 5 of the Act of 1892 (2 Sup. R. S., p. 13) upon bail on habeas corpus in certain Chinese cases does not apply here, this not being "an application to any judge or Court of the United States in the first instance for a writ of habeas corpus by a Chinese person seeking to land in the United States, to whom the privilege has been denied."

Appellants entered the United States by land and were thereafter arrested here in judicial proceedings on the Commissioner's warrant, while the statute just quoted refers only to cases where

landing in the United States is sought to be effected by means of a habeas corpus, by one prevented from landing, its purposes being obviously to prevent the use of judicial machinery itself to secure admission at large into the country.

In its brief herein, the Government concedes that this statute does not apply to these cases, but invokes it as supposed to indicate a legislative policy here applicable. It is submitted that the very opposite is the proper inference. The statute recognizes the general right to bail in these cases and forbids its allowance in a particular instance, involving materially different circumstances than are here present. The rule "*Expressio unius est exclusio alterius*" is, it is submitted, directly applicable.

In its brief herein the Government quotes from a decision by Judge Lacombe in the case of

In re Chin Yuen Sing, 65 F. R., 788,

in which, without deciding the question of *power* to bail, that judge declined to exercise it, as a matter of discretion, where an appeal was taken by a Chinese petitioner *seeking to land in the United States by means of habeas corpus proceedings*, from a decision adverse to him. As already observed, that case presented the question of attempt to enter the country by means of habeas corpus proceedings, unlike this case. But it is within the personal knowledge of counsel (one of whom had charge of this very case on behalf of the Government as Assistant United States Attorney) and shown by the records of the Circuit Court and the U. S. Attorney's office, that in that very case, when the bad effects upon that defendant's health resulting from confinement in jail under conditions of detention and food so foreign to him, were subsequently called to the at-

tention of the Court, both the question of "power" and of "discretion" were subsequently determined by Judge Lacombe in that defendant's favor, by bailing him.

Similarly, in the Wong Kim Ark case (169 U. S., 649, 652), involving the same conditions, bail was allowed, notwithstanding the prohibition of Section 5 of the Act of 1892, in favor of one claiming American citizenship. That question cannot be absolutely prejudged, until the final decision on the appeal. This was in line with Hudson vs. Parker, *supra*.

POINT III.

The provision of the Act of 1893, invoked by the Government, is not applicable because it relates only to orders for deportation in non-registration cases, and not to cases of alleged unlawful entry, such as are here involved.

This is the principal provision relied on by the Government, being a portion of Sec. 2 of the Act of November 3, 1893 (2 Supp. R. S., p. 154, 28 Stat., 7), reading as follows:

> "Such order of deportation shall be executed by the United States Marshal of the district within which such order is made, and he shall execute the same with all convenient dispatch; and *pending the execution of such order*, such Chinese person shall remain in the custody of the United States Marshal, and *shall not be admitted to bail*."

(a) *By its express terms the provision is limited to* "SUCH" *orders of deportation, and does not apply to all deportation orders.* An examina-

tion of the statute shows clearly that it refers only to non-registration cases and not to alleged unlawful entry cases, such as are here under consideration. The only possible antecedent for "*such*" orders of deportation, and in fact the only order of deportation under consideration in the whole Act of 1893 (or in Section 6 of the Act of 1892, for which it is a substitute), is the order of deportation for non-registration. In the Act of 1893 there are only two references to orders of deportation, besides the particular clause invoked by the Government. The first is in the non-registration clause, which provides:

> That a Chinese person arrested for *non-registering* "may be taken before a United States Judge, whose duty it shall be to *order that he be deported from the United States, as provided in this act and in the act to which this is an amendment*, unless he shall establish clearly to the satisfaction of said Judge," etc.

This is obviously the antecedent of "such order," and relates only to non-registration, and not to unlawful entry cases (Fong Yue Ting vs. U. S., 149 U. S., 698, 725–6). The proviso of the amended Sec. 6 of the Act of 1893 also refers to deportation for non-registration, but merely by *excepting* convicted felons from the provisions of the Act of 1893 granting an additional six months within which to *register*, and discontinuing pending cases.

Obviously, in making provision for "such" orders of deportation, only the orders specified in the Act of 1893 were referred to. The Government's construction seeks to eliminate the word of limitation "such" from the statute, and make the section applicable to orders of deportation not referred to in the Act of 1893. The language of

this Court in U. S. v. Gooding, 12 Wheaton, 460, 477, as to the same term is directly applicable. Judge Story there said for this Court:

> "But it is sufficient to say that the word 'such' has an appropriate sense, and can be reasonably referred only to the ship or vessel *previously* spoken of. * * * If we were to adopt any other construction, we should read the words as if 'such' were struck out and the clause stood 'any ship or vessel.' Such a course would not be defensible in construing a penal statute."

The Government asks this Court in effect to legislate, not to construe this statute (U. S. vs. Goldenberg, 168 U. S., 95) and, as in the Gooding case, to substitute "any" for "such."

(*b*) *The language of the amended Section 6 shows clearly that the custody and bail provision of Section 2 of the Act of 1893 refers only to it.* The original Section 6 of the Act of 1892 (2 Sup. R. S., p. 13, 27 Stat., 25) had provided that a Chinese laborer not registering, after arrest, "shall be taken before a United States judge, whose duty it shall be to order that he be deported from the United States as hereinbefore provided." The "hereinbefore provided" clause was Section 2 of the Act of 1892, enacting that convicted defendants shall be deported to China, unless they establish that they are subjects of some other country (Section 4 was eliminated by the holding that it is unconstitutional. Wong Wing v. U. S., 163 U. S., 228). The amended Sec. 6 of the Act of 1893 now provided that persons convicted for non-registering shall "be deported from the United States, *as provided in this act* and in the act to which this is an amendment;" thus referring, in deportation cases for non-regis-

tering, not only to this provision of the Act of 1892 as to country of deportation, but to the very provision on the subject of deportation here invoked in the Act of 1893. The only provision in the Act of 1893 as to method of deportation is this custody and bail provision, which is thus *incorporated by reference into the non-registration provision*, and this clearly shows once more that the term "*such* order" corresponds with this clause of the *non registration provision*.

(c) *The whole Act of 1893 in terms amends only the non-registration provision (Section 6) of the Act of 1892, by substituting its two sections for the original Section Six.* The enacting clause of the Act of 1893 expressly provides that "Section 6" of the Act of 1892 "is hereby amended so as to read as follows," thus substituting the two new sections for the original section. The bail clause is contained in one of these sections. The registration provisions of the statute, which had just been sustained as constitutional in the Fong Yue Ting case (149 U. S., 698) were amended by giving the thousands of Chinese persons who had not registered, under advice that the Act was unconstitutional, a further opportunity to register, and by enacting additional procedure provisions as to such registration. The scheme of the amendment shows that it applies only to registration cases.

(d) *Throughout the Act of 1893, whenever it was intended to make any provisions apply to unlawful entry cases, the language used unmistakably indicates this:* The Geary law in 1892 first introduced the registration features (Sections 6 and 7), and whenever the unlawful entry cases are under consideration, Congress in the Act of 1893 took care to employ such words as "*in the act to which this is an amendment*," in addition to the words

"in this act." Notice, in Section 2 of the Act of 1893 (2 Sup. R. S., p. 154), the first two definition provisions, so drawn. Similarly, in the Act of 1892, the language is carefully selected to make certain provisions apply to unlawful entry cases and others to non-registration cases. In fact, in the Fong Yue Ting case (149 U. S., at 725), this Court, after referring to Section 1 of the Act of 1892, as continuing the earlier acts, adds:

> "The rest of the act (laying aside an immaterial Section 5, relating to an application for a writ of habeas corpus by a Chinese person seeking to land in the United States, to whom that privilege has been denied), deals with two classes of Chinese persons; first those not lawfully entitled to be or remain in the United States; and, second, those entitled to remain in the United States. These words of description neither confer nor take away any right, but simply designate the Chinese persons who were not, or who were, authorized or permitted to remain in the United States under the laws and treaties existing at the time of the passage of this Act. * * * Sections 2–4 concern Chinese 'not lawfully entitled to be or remain in the United States. * * * Sections 6 and 7 are the only sections which have any bearing on the cases before us. * * * The manifest objects of these sections are to provide a system of registration and identification of such Chinese laborers."

(*e*) So, also, the provision next following the bail provision invoked by the Government in Section 2 of the Act of 1893 shows that only the registration cases were under consideration; for it prescribes, without further introductory phrases, the form of the registration certificate.

(*f*) *Good reasons for Congress, limiting this custody and bail provision to non registration*

cases are at hand. The prime purpose of the act of 1893 was to extend the time for registering, which requirement about 100,000 Chinese persons had neglected to comply with originally, because of the doubts as to its constitutionality. To compel Chinese laborers to comply with the Act and to overcome their unwillingness, drastic measures for such non-compliance were prescribed, including this non-bailing clause.

Moreover, the non-registration proceedings are to be heard, by the terms of the statute (Sec. 6 of the Act of 1893, 2 Sup. R. S., p. 123), before a *U. S. Judge*, and not by the Court, nor by a Commissioner (Fong Yue Ting case, 149 U. S., at 728, they are, therefore, not appealable under Section 13 of the Act of Sept. 13, 1888, to the District Court, nor under the C. C. A. Act, and not being appealable at all, provisions as to bail on appeal would be meaningless.

(*g*) A few words may be added as to the non-applicability of the registration provisions. In the Government Brief it is suggested that appellants are laborers, that it is to be assumed that they did not register, and the deportation and non-bailing provisions in registration cases should be applied. This ignores, among other things, the fact that defendants were charged in the complaint, and tried, not for not registering, but for alleged unlawful entry. Moreover, the Government denies that they were in the United States when the registration provision was passed, which merely required Chinese laborers *then* in the United States to register, by its express terms. In addition it is perfectly clear that the U. S. Commissioner who ordered their deportation had no jurisdiction over a non-registration case. The non-registration provision (Section 6 of the Act of

1892, amended in 1893) confers jurisdiction over such cases on United States "judges" alone, not on Commissioners, and we do not understand the Government seriously to contend that a Commissioner is a "judge" within the meaning of this Section. This Court has decided the question to the contrary (Todd vs. U. S., 158, U. S., 278, and Rice vs. Ames, 180 U. S., 371) and the precise point under this statute has been determined (Fong Yue Ting vs. U. S., 149 U. S., at 728, oral decision by LACOMBE, J., March, 1898, in the case of U. S. vs. Sing Kin San, disapproving of a California decision to the contrary, and the Treasury Department by rulings made Feb. 27, 1899, and April 14, 1899, also declined to confuse the inferior with the superior office). It is unnecessary to consider other grounds of inapplicability of the registration provision, we believe. We desire to remark, however, that of course the Commissioner's decision that appellants are laborers, if made by him without jurisdiction, is a nullity. Moreover, the Commissioner's finding that appellants are laborers partakes of the nature of a conclusion of law. The treaty of 1880 with China authorized the exclusion by legislation of laborers only, the statutes of the United States required merchants to show their non-laborer character in a prescribed way to carry the treaty into effect (U. S. vs. Mrs. Gue Lim, 176 U. S., 459, 467), and accordingly all persons whose right to remain is denied, whether for want of affirmative evidence or as a conclusion of law, are commonly described as laborers in the order of deportation. On issues as to citizenship, the laborer status was in fact not involved.

POINT IV.

The provision about bail (Act of Nov. 3d, 1893) does not apply to appeals, which are provided for by other Acts, and the language of the Act shows that bail on appeals was not within the legislative contemplation in framing this provision.

(*a*) The opinion on this point of Judge Brown (May 3d, 1901) in U. S. vs. Du Shen Tau, *et al.*, is here directly in point; he held:

> "Upon an allowance of appeal in the above matter the Court directed that the Chinamen be admitted to bail in the sum of $500 each, and a motion has been made on the part of the Government to vacate the allowance of bail on the ground that by Section 2 of the Act of November 3d, 1893, 28 Stat. at L., p. 7, it is provided:
>
> 'That pending the execution of the order of deportation such Chinese persons * * * shall not be admitted to bail.'
>
> The uniform practice in many cases in this District since the passage of the Act of 1893, has been to admit to bail during the pendency of an appeal. Most of the Judges in this Circuit have made such orders, as I have done frequently. The provision above referred to has not been supposed to affect the authority of the Court or the ordinary practice of the Court during appeals to admit to bail, and so far as I know, this right has not been previously questioned. I am informed by counsel that the question is now pending before the Circuit Court of Appeals in this District. I have examined with some care the brief submitted by the defendants, and am of the opinion that there is reasonable question whether the above provision of the Act of 1893 was designed to affect or does in fact affect the

right to admit to bail pending an appeal. Considering that the question is now pending in the Court of Appeals, and probably will be shortly determined, and in view of the general practice previously to admit to bail, I think it is better to adhere to that practice until the decision is made by the Court of Appeals."

(*b*) Appeals in Chinese Exclusion cases are authorized by Sec. 13 of the Act of September 13th, 1888 (2 Sup. R. S., p. 144) as regards appeals from U. S. Commissioner to the District Court, and from the District Court to this Court, or the Circuit Court of Appeals, by the C. C. A. Act.

The general statues and rules as to bail apply to them. *The act of 1893 nowhere even refers to appeals, does not attempt to deal with that subject nor the disposition of Chinese persons pending appeals, and does not modify the existing system relative to that matter.*

The question is governed by the principle of statutory construction that *special statutes, like those as to appeals, are not modified or repealed by subsequent general statutes, in the absence of language unmistakably indicating that the subject matter of the special statute was within legislative contemplation.*

As said by the Supreme Court in Ex. p. Crow Dog, 109 U. S., 556:

> "The language of the exception is special and express; the words relied on as a repeal are general and inconclusive. The rule is *Generalia specialibus non derogant.* "The general principle to be applied," said Bovill, C. J., in Thorpe vs. Adams, L. R., 6 C. P., 135, 'to the construction of Acts of Parliament is that a general Act is not to be construed to repeal a previous particular act, unless there is some express reference to the

previous legislation on the subject, or unless there is a necessary inconsistency in the two Acts standing together.' 'And the reason is.' said Wood, V.C., in Fitzgerald vs. Champneys, 30 L. J. Ch. 782; 2 Johns & H., 31, 54. 'that the Legislature, having had its attention directed to a special subject, and having observed all circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do.' "

(c) *The Act deals only with the disposition of such defendants "pending the execution of such order" of deportation, and when appeals are taken and the whole case taken to a higher Court, the "execution" of the order of deportation is in no sense "pending."* If Congress had intended to make this provision applicable to appeals, it would have used that term or at least have used such language as "*after* deportation is once ordered," and not used the phrase "pending the execution of such order." *The language of the Act is quite inappropriate to express any intention to bar bail on an appeal* or in habeas corpus proceedings. In fact, Attorney General Griggs ruled that appeals in Chinese exclusion cases, if they do not vacate the orders of deportation, at any rate suspend the order of deportation (22 Opinions, 340), so the language "pending the execution of such order" is not an apt reference to appeals.

(d) *A consideration of the history of the times and the situation which existed at the time this Act of 1893 was passed shows clearly that this act aims at conditions in no way concerning appeals.* Before its passage there were about 100,000 Chinese laborers in the United States liable to deportation for not having registered under the Act of 1892. Congress had appropriated only $50,000 for enforc-

ing all the Chinese Exclusion Acts, which amount had been previously necessary for unlawful entry cases alone. The Treasury Department construed this appropriation to be available only for unlawful entry cases. Moreover, no clause in the act in terms authorized detention pending execution of the order of deportation, and there was a controversy between the Department of Justice and the Treasury Department, as to which department was to enforce such orders. Accordingly Judge Lacombe, on May 26th, 1893, directed the discharge of Chinese persons whose deportation had been ordered in proceedings not appealed from, until the requisite departmental authority to execute the order was conferred. (*In re* Ny Look, 56 Fed. Rep., 81; see also *In re Lintner*, 57 Fed. Rep., 587.) This practice was in line with the California precedents in habeas cases already considered. The Attorney-General joined in this solution of the problem, and requested U. S. Attorneys to ask the judges in their districts to make similar orders, which was done everywhere, except in one California case (U. S. vs. Chum Shang Yuen, 57 Fed. Rep., 588; Congressional Record, 53d Congress, Vol. 25, Part II, p. 2444). When Chinese legislation was being considered by Congress at the session at which the Act of 1893 was passed, it called on the Attorney General for the correspondence relative to this decision of Judge Lacombe's, which was furnished on September 23, 1893 (see Congressional Record, *supra*). It was to meet this situation that Congress passed this provision of the Act of November 3d, 1893, requiring detention in custody and forbidding bail. *Appeals were not under consideration, but only this practice, of discharging and bailing after final unreviewed orders of deportation. The language of the Act expresses such intent, and is not applicable to appeals.*

(*e*) The intent to work such hardship as to absolutely require imprisonment pending appeals bound to take up some time, cannot be imputed to Congress from the language used, particularly not in the light of Article III of the Treaty of 1880 and Article IV of the Treaty of 1894, granting to Chinese persons protection for their person and property, such as is conferred on the most favored nation (see pp. 10, 11, *supra*).

This provision of the Treaty is no mere idle play of words, but confers and assures substantial rights, as has been held in cases involving it (Yick Wo vs. Hopkins, 118 U. S., 356, 368–9; *In re* Quong Woo, 13 Fed. Rep., 229, 233 (Field, J.); *In re* Oh Chong, 2 F. R., 733, 737–9; *In re* Parrot, 1 F. R., 481, 483, 498). If this clause in the Treaty of 1880 was modified by the Acts of 1892 and 1893, such repeal has itself been superseded by the more specific and definite provisions of the Treaty of 1894, promulgated later than those statutes.

POINT V.

The Government's construction of the Act, making it applicable to appeals, would render it unconstitutional, the Courts having held that imprisonment as distinguished from mere brief detention incidental to deportation, renders these Deportation Acts unconstitutional (Wong Wing vs. U. S., 163 U. S., 228; U. S. vs. Wong Dep Ken, 57 Fed. Rep., 206; In re Lintner, 57 Fed. Rep., 587), and it would also be superseded by the later provision of Article IV of the Treaty of 1894, granting Chinese persons all the rights of protection accorded to subjects of the most favored nations.

What the Government cannot do directly it cannot do indirectly, for applying this non-bailing provision to appeals would involve imprisonment for months or years, and that even in cases where the Government appeals, as in the Lee Yen Tai case. In view of the Constitutional provisions about due process of law, and particularly of the 8th Amendment as to excessive bail, such construction would render the Act unconstitutional, and it is therefore untenable. The very point was decided by Judge Ross in *In re* Lintner, 57 Fed. Rep., 587, where he said:

> "They could not be put in the penitentiary at hard labor, as provided by Section 4 of the Geary Law, for the reasons given in the recent opinion of the District Court of this District, in the case of U. S. vs. Wong Dep Ken, and *any unreasonable detention of them*

by the officers would doubtless entitle them to discharge on writs of habeas corpus."

See cases quoted *supra*, also (Point I) particularly Case of the Chinese Wife, 21 F. R., 808 (p. 10, *supra*).

The application of the treaty provisions as to protection of person of Chinese persons should also be noted here, together with the fact that the subsequent treaty of 1894 repeals Section 2 of the Act of 1893 by its article V, if the Government's construction of the former section be correct.

POINT VI.

The provision cannot be applied where the defendants claim American citizenship, or where the Commissioner's jurisdiction is attacked, as is here the case.

It is well settled that the Acts do not apply to Chinese persons born within the United States (U. S. vs. Wong Kim Ark, 169 U. S., 649). The Courts cannot, while this question is *bona fide* in controversy, decide the question in advance once for all times and courts, and refuse bail on appeal. Hence, as shown, in the report of the Wong Kim Ark case, 169 U. S., at 652, bail was there properly allowed even to a Chinese person seeking to land within the United States under the claim of American citizenship, notwithstanding the prohibition of Sec. 5 of the Act of 1892. The cases of these appellants present this claim.

So, also, where the jurisdiction of the Commissioner who ordered deportation is in good faith

attacked, this Court should not decide in favor of jurisdiction by giving the order, in advance of final decision, the force of one made with jurisdiction (Hudson vs. Parker, *supra*).

In the case of Lee Yen Tai, in fact, Judge Brown, on habeas, has held that the Commissioner was without jurisdiction, and the Government appeals; yet it seeks to enforce this order, held to be without jurisdiction, and to give it the effect of a valid order. If the Government's contention be right as to the application of this provision to such a case, any white citizen of the United States may be imprisoned indefinitely, if some one chooses to proceed against him under the Chinese Exclusion Laws, and some Commissioner decides the questions of fact against him on the ground that he has not met the burden of proof thrown on him by Section 3 of the Act of 1892 to the Commissioner's "satisfaction" by "affirmative" evidence.

Of course the right to a supersedias pending appeal is clear (*In re* Claasen, 140 U. S., 200; Cheong Ah Moy vs. U. S., 113 U. S., 216.

The motion should be denied.

Respectfully submitted,

B. LEWINSON,
MAX J. KOHLER,
Of Counsel for Appellants.

Nos. 525 & 526

FILED
MAR. 7 1902
JAMES H. MCKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

Brf. of Lewinson for Appts.

CHIN BAK KAN,
Appellant,
vs.
THE UNITED STATES.

Filed March 7, 1902.

No. 525.

CHIN YING,
Appellant,
vs.
THE UNITED STATES.

No. 526.

BRIEF FOR APPELLANTS.

B. LEWINSON,
MAX J. KOHLER,
Of Counsel for Appellants.

APPEAL PRINTING CO., 14-16 VESEY STREET.
Telephone, 192 Cortlandt.
1902.

IN THE

Supreme Court of the United States.

CHIN BAK KAN, Appellant, vs. THE UNITED STATES.	No. 525.
CHIN YING, Appellant, vs. THE UNITED STATES.	No. 526.

Brief for Appellants.

These are appeals from orders of the U. S. District Court for the Northern District of New York, affirming orders of deportation made against defendants-appellants in cases arising under the Chinese Exclusion Laws. Appeals were taken direct to this Court from the District Court, because treaty and constitutional questions are involved. These two cases were advanced and set down to be heard as one cause with the case of

United States vs. Lee Yen Tai (No. 503), which is here on a certificate from the U. S. Circuit Court of Appeals for the Second Circuit.

Both cases arose before U. S. Commissioner Woodward of the Northern District of New York, who issued his warrants for the arrest of defendants on March 13th, 1901, on complaints on information and belief only, not setting forth any sources of information or grounds of belief, charging defendants with being Chinese persons and laborers, who had just entered the United States unlawfully, and without the certificates prescribed by law. After hearings in each case, in which both defendants claimed to be American citizens, and after a transfer of the cases to Commissioner Dudley by consent, by reason of Commissioner Woodward's illness, orders of deportation were made against defendants. They appealed to the District Court under Section 13 of the Act of Sept. 13, 1888, where the orders of deportation were affirmed. These appeals were thereafter allowed by Mr. Justice Peckham.

In the CHIN BAK KAN CASE (No 525), the complaint is found in the Transcript of Record (fol. 29). Defendant pleaded not guilty (fol. 26), was advised of his right to refrain from testifying himself (fol. 26), in accord with a prior decision of Judge Coxe of that district (Ex. p. Sing, 82 Fed. Rep., 22, compare Lees vs. U. S., 150 U. S., 476; Sec. 860 Rev. St.), and introduced as a witness in his favor his uncle, Gong Wing (fol. 7), who testified to defendant's birth in San Francisco at No. 847

Dupont street, in a house where the witness's sister (defendant's mother), and her husband were then living, 22 years ago (fol. 8). The witness knew defendant for the next seven years after his birth in San Francisco; then defendant went to China with his parents, and the witness saw him there frequently during visits to China paid by the witness (1889-1891, and 1897 to 1899), and was thereafter advised of defendant's intention to come again to the United States. The Government introduced a witness, Lee Sing, who testified that the alleged uncle of the boy did not come to the United States till years after he stated, and that no woman lived in the house specified, though he concedes that many Chinese women lived at the time in San Francisco. The witness appears voluntarily to testify, admits that he had previously testified for the Government in another Chinese case, after first denying this (fol. 21), and knows nothing about any of the places in the neighborhood of No. 847 Dupont street, except the particular number defendant's witness had testified about on the prior hearing, remembers the exact date of said uncle's arrival in America, and the steamer, and does not explain satisfactorily how he acquired his exact knowledge about defendant's family and this house. The evidence that defendant's father was a merchant is uncontradicted (fol. 8), and there is no evidence to show that defendant himself is or ever was a laborer. On this record, the Commissioner has found, without a particle of evidence to sustain his holding, that defendant is a Chinese laborer

(fol. 27). On the material question of citizenship, he has made no finding but merely concludes, in accord with Section 2 of the Act of 1892, in order to fix the country to which defendant should be deported, that "said Chin Bak Kan came from the Empire of China, but he has not made it appear to me that he was a subject or citizen of some other country than China" (fol. 27).

In the CHIN YING CASE (No. 526), the complaint is found in the Transcript of Record (fol. 19). Defendant pleaded not guilty, and introduced as a witness in his favor, his uncle, Lee Hong, who testifies that defendant was born in San Francisco, at No. 721 Commercial street, thirty-one years ago, defendant living then in the same house. When defendant was 10 he went back to China, but witness saw him there during a year's visit to China ten years ago. Defendant's father wrote to him, advising him of defendant's coming. No evidence whatever was introduced as to defendant's being a laborer. The Government introduced no evidence whatever, except some documents not shown to refer in any way to this case, and rebutting the allegations of the complaint as to defendant's status, if they do pertain to this defendant (fols. 11–18). On the cross-examination of defendant's uncle, he had identified a photograph as a likeness of defendant, which was marked "Exhibit A for identification" (fol. 8), by Commissioner Woodward. Subsequently a paper which Commissioner Dudley marked Exhibit A was introduced in evidence (fol. 11). The record does not show it to be the same paper. It refers

to the application of a Chinese merchant, Sum Jim, for admission in December, 1899; none of the names or addresses of any of the parties therein are the same as those referred to in the evidence in this case. Even if the photograph could be assumed to have been that of this defendant (though marked only for identification), the papers in question do not contain any admissions by him or anyone shown to have been authorized to act for him, nor were they ever in his possession. If it should, however, be assumed that Sum Jim is this defendant Chin Ying, the uncontradicted evidence of at least three white witnesses, admitted by consent, shows that Sum Jim was a merchant in New York for years prior to his departure for China, May 27, 1897, answering the definition of Section 2 of the Act of Nov. 3d, 1893 (see Li Sing vs. U. S., 180 U. S., 486), that the collector arbitrarily and unjustly declined to admit him in 1899 on his return to the United States, and that, pursuant to law, he took an appeal to the Secretary of the Treasury, which is undetermined (fol. 11). His right and duty by affirmative evidence, when found within the country, to establish his right to remain here, in judicial proceedings taken against him, was recognized in the analogous Li Sing case (180 U. S., 486). Upon this evidence, the commissioner has found, without any evidence, that Chin Ying is a Chinese laborer (fol. 24). The material question of citizenship was not decided, but was treated in the same way as in the Chin Bak Kan case.

Upon these records the following assignments of error are urged:

(Chin Bak Kan Record, fols. 41–2.
Chin Ying Record, fols. 34–36.)

1st. That the commissioner had no jurisdiction over these causes, because the Treaty of 1894 repealed the procedure provision. (This question, certified to this Court in the Lee Yen Tai case, arises here in cases instituted after the Act of March 3d, 1901, had been passed, which Act, it is contended, does not change the result).

2d. The Commissioner acted without jurisdiction, because the complaints were not under such oath as is required by law.

3d. The Commissioner and Judge had no jurisdiction over defendants, because of their claim to American citizenship.

4th. The application of the burden of proof provision (Section 3 of the Act of 1892) to defendants, claiming American citizenship, is unconstitutional.

5th. The burden of proof provision was repealed by the Treaty of 1894.

6th. In not holding that appellants' American citizenship was established.

7th. In not ordering appellants' discharge.

As to the jurisdiction of this Court over these appeals, it is scarcely necessary to say anything, in view of the Government's concession of juris-

diction over appeals, and the precedents in this Court. Section 13 of the Act of Sept. 13th, 1888 (2 Sup. R. S., p. 144), in as far as it relates to appeals, was not made dependent by Section 1 of that Act upon the ratification of the Treaty with China of 1888, and hence appeals from Commissioners to District Courts were thereby authorized. Section 13 properly distinguishes, in thus allowing appeals, between the Commissioner and the Judge of the Court, just as the Bankruptcy Law allows certification from Referee to Judge, the proceedings both before the Commissioner and Judge being in the District Court, and the distinction being, not between "Judge" and "Court," but between "Judge" and "Commissioner" of the District Court; hence the Act allows appeals "to the Judge of the District Court for the district" and from the District Court under the Circuit Court of Appeals' Act (U. S. vs. Gee Lee, 50 F. R., 271, C. C. A., 9th Circuit; U. S. vs. Pin Kwan, 100 Fed. Rep., 609, C. C. A.; Wong Wing vs. U. S., 163 U. S., 228, 229; U. S. vs. Mrs. Gue Lim, 176 U. S., 459). In accordance with the express language of Section 13 of the Act of Sept. 13, 1888, allowing an "appeal," consideration of the peculiar non-legal nature of the proceedings and the remedy, and the precedents in this Court, appeals, and not writs of error, were secured.

I.

The point as to the Commissioner's jurisdiction under the treaty of 1894, taken in the Lee Yen Tai case, applies to these cases, notwithstanding the Act of March 3d, 1901, 31, Stat., 1093).

The question certified to this Court in the Lee Yen Tai case, and considered in the separate brief in that case, applies to these two cases also, notwithstanding the fact that the two cases now under consideration were commenced after the passage of the Act of March 3d, 1901 (31 St., 1093). (Reference is made to our brief in that case.)

That Act reads:

> *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, that it shall be lawful for the District Attorney of the district in which any Chinese person may be arrested for being found unlawfully within the United States, or having unlawfully entered the United States, to designate the United States Commissioner within such district before whom such Chinese person shall be taken for hearing.

Sec. 2. That a United States Commissioner shall be entitled to receive a fee of five dollars for hearing and deciding a case arising under the Chinese exclusion laws.

Sec. 3. That no warrant of arrest for violations of the Chinese exclusion laws shall be issued by United States Commissioners excepting upon the

sworn complaint of a United States District Attorney, Assistant United States District Attorney, Collector, Deputy Collector, or Inspector of Customs, Immigration Inspector, United States Marshal, or Deputy United States Marshal, or Chinese Inspector, unless the issuing of such warrant of arrest shall first be approved or requested in writing by the United States District Attorney of the district in which issued.

Sec. 4. That this act shall take effect immediately.

(1) That statute is inapplicable to the present cases, because it has not been followed. The written approval or request from the United States Attorney referred to in that statute was not given (see Second Assignment of Errors), the complaint not being made by any of the officers specified (French vs. Edwards, 13 Wall., 506; U. S. vs. Sapinkow, 90 F. R., 654, 660). Nor is the complaint under oath, as required by that Act (see Point II).

(2) The act in question does not confer jurisdiction on U. S. Commissioners. It is a mere reference to a jurisdiction supposed by the lawmaking body to have already been conferred. Even the original Section 12 of the Acts of 1882 and 1884, was regarded as almost too meagre to confer jurisdiction (*In re* Chow Goo Pooi, 25 F. R.,77). If the treaty has, as contended, taken away the Commissioner's jurisdiction in this class of cases, it is submitted that this clause does not suffice to confer it again. The erroneous belief of the legislature that a statute is still in force, even though expressed in a statute, does not

bind the Courts (U. S. vs. Claflin, 97 U. S., 546). This is particularly true where, as here, a violation of a treaty with a foreign power would result, and the legislative intent to violate such treaty must unmistakably appear.

(3) But, as suggested in the Lee Yen Tai brief, such statute cannot be given the force of law, as it would be unconstitutional. It would constitute a violation of the constitutional provision as to the appointment of U. S. Commissioners, by conferring such power in each particular case on authorities other than those designated by the U. S. Constitution (Article II, Sec. 2, par. 2), would be further illegal as a delegation of judicial power on an executive officer, and would violate due process of law and the constitutional separation of executive and judicial powers, in enabling prosecuting officers to improperly influence or coerce U. S. Commissioners, by withholding such causes and compensation from Commissioners who do not do the bidding of the particular executive officer.

Statutes of this character seem to be without precedent in our history; their obvious tendency to subvert fair and impartial judicial hearings is obvious.

(*a*) The statute is in violation of the constitutional provisions as to power of appointment of U. S. officers. Before an officer has been "appointed" to hear these cases, action to complete the appointment by the U. S. Attorney is necessary, to determine which of the various Commission-

ers may hear the case, no matter who is the complainant. The U. S. Attorney's motive need not be disclosed; his action may be based on any grounds that may appeal to him, his convenience, comfort, mistaken zeal, vanity, or desire to reach a particular result, or to make a "record."

But Congress has made different provisions for such appointment. In the recent case of

Rice vs. Ames, 180 U. S., 371, 378,

this Court, in dealing with the appointment of U. S. Commissioners, said:

> "Congress having provided for commissioners who are not judges in the constitutional sense, had a perfect right under Article 2, Section 2, paragraph 2 of the Constitution to invest the District or Circuit Courts with the power of appointment. * * * We know of no authority holding that Congress may not vest the Courts with this power, and we are reluctant to create one."

Here, instead of leaving the appointment to the "courts" or to one of the other authorities designated by the Constitution, the U. S. Attorney, the prosecuting officer, is authorized to take a hand in the appointment, and thus, in a measure, made a judge in his own case.

Article II, Section 2, paragraph 2 provides:

> "Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the Courts of Law, or in the heads of Departments."

This provision, though applicable, has been here disregarded by Congress.

U. S. vs. Germaine, 99 U. S., 508.

Contingencies of this very kind were anticipated and condemned by this Court, as applied to the Chinese Exclusion Laws, in

Wong Wing vs. U. S., 163 U. S., 228, 237, where it was held:

> "It is not consistent with the theory of our government that the legislature should, after having defined an offence as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents."

(*b*) Moreover, such course is inconsistent with the fundamental principles of our Government, by which executive and judicial powers are separated.

In re Hayburn, 2 Dallas, 409, *note.*
Kilbourn vs. Thompson, 103 U. S., 168.
Interstate Com. Com. vs. Brinson, 154 U. S, 447, 480.

It constitutes an unauthorized delegation of judicial power.

U. S. vs. Rider, 50 F. R., 406.
U. S. vs. Keokuk Bridge Co., 45 Fed. Rep., 178.

Compare

U. S. vs. Rider, 178 U. S., 251.

Such course is contrary to due process of law (Holden vs. Hardy, 169 U. S., 366, 389, 390) and makes the prosecuting officer in some measure a judge in his own case (Cooley's Const. Limitations

(5th Ed.), pp. 410–413). The rule applicable is well laid down in the

Am. and Eng. Ency. of Law, (2d Ed.), Vol. VI., p. 1054.

> "To assume to vest judicial functions elsewhere than in the tribunals established by the constitution * * * would clearly be without the sphere of legislative action. Statutes which attempt to confer judicial power upon executive or ministerial officers are invalid."

The history of Anglo-Saxon jurisprudence shows how zealously the Courts have preserved our institutions from such encroachments upon judicial power.

II.

The complaints were not upon such oath as is necessary to confer jurisdiction upon the U. S. Commissioner.

(1) Both of these defendants claimed American citizenship, and we are not, therefore, dealing with cases involving conceded aliens. They were arrested under complaints stating no facts on oath against them, mere information and belief being averred, without any source or grounds therefor. Until their alienage be established, the provisions of the Constitution (4th Amendment) apply:

"No warrants shall issue but upon probable cause, supported by Oath or Affirmation."

A holding by this inferior magistrate, based upon

a reversal of the burden of proof, without any complaint even on oath, that defendants have not established to his "satisfaction" their lawful right to remain in the United States (Sec. 3 of the Act of May 5th, 1892), is no substitute for their constitutional privilege.

This Court has determined that Chinese persons born in the United States are citizens of the United States (U. S. vs. Wong Kim Ark, 169 U. S., 649), and persons claiming American citizenship cannot have their rights passed upon or violated by the application of such principles, applicable only to aliens.

Fong Yue Ting vs. U. S., 149 U. S., 698.

In fact, it will be observed that on the material point in these two cases, that of citizenship, the Commissioner has in fact made no finding whatever; he merely decides that the defendants are laborers, without a particle of evidence in the record to that effect.

(2) Apart from questions of citizenship, however, it is submitted that the laws applicable at the time of the arrest and trial of these defendants, even if they be regarded as aliens, required a complaint on oath, and not mere information and belief, as a prerequisite to the Commissioner's taking jurisdiction.

It is true that in the Fong Yue Ting case, 149 U. S., 698, 729, this Court held that under Section 6 of the Act of 1892 (the Registration provision)

> "no formal complaint or pleadings are required, and the want of them does not affect

> the authority of the judge, or the validity of the statute."

But that involved entirely different procedure provisions, and the non-registration proceedings do not present issues like those raised in alleged unlawful entry cases. Even the original Section 12 of the Acts of 1882 and 1884 much more clearly prescribed the usual oath as the basis of the warrant of arrest in these cases, and certainly does not dispense with the same.

But there have been a number of later enactments that are of great importance, in determining whether oaths are not prescribed in unlawful entry cases.

Section 13 of the Act of Sept. 13th, 1888, in terms prescribes that the arrest must be "upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States."

The applicability of this section to cases of this character was recognized in

> Wong Wing vs. U. S., 163 U. S., 228, 229, and
> U. S. vs. Long Hop, 55 F. R., 58.

Next we find that China, by the Treaty of 1894, made provisions designed to put an end to anomalous, barbarous arrests without oath, and it was provided that her subjects

> "shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation."

No such provisions for arrest except upon oath, is to be found on our statute books concerning the subjects of any other nation, most or least "favored."

Any possible question on the subject seems to have been removed, however, before these arrests were made, by the enactment of the Act of March 3d, 1901, which went into effect immediately, prescribing sworn complaints. For want of these, the commissioner herein acted without jurisdiction (See Statute quoted *supra*, Point I).

The decisions of the Courts are clear and authoritative to the effect that complaints like these, on information and belief alone, stating no sources or grounds of information or belief, are insufficient to confer jurisdiction.

Rice vs. Ames, 180 U. S., 371, 374.
Ex parte Hart, 63 F. R., 249, 259 (C. C. A.).
Ex parte Lane, 6 F. R., 34, 38 (Mr. Justice Brown).
U. S. vs. Tureaud, 20 F. R., 621.
U. S. vs. Sapinkow, 90 F. R., 654, 660.

The insufficiency of these complaints appears from mere inspection (Record in Chin Bak Kan case, No. 525, fol. 29; Chin Ying case, No. 526, fol. 19).

Not having acquired jurisdiction over them, the commissioner never was authorized to require defendants "by affirmative evidence" to establish to his "satisfaction" their right to remain in the

United States (Section 3 of the Act of May 5th, 1892) nor to order their deportation.

As said by this Court in Rice vs. Ames, *supra:*

> "The first assignment of error is to the effect that the commissioner issuing the warrant had no jurisdiction, because the complaint of Greer was upon information and belief, and not such as was required by the treaty, or by Section 5270 of the Revised Statutes. The first two complaints, which were dismissed, as well as the first count of the complaint, under which the proceedings were finally had, were obviously insufficient, since the charges were made solely upon information and belief, and no attempt was made even to set forth the sources or the grounds of affiant's belief."

POINT III.

The Commissioner had no jurisdiction over appellants, because of their claim of American citizenship, and the application to them of the burden of proof provision (Section 3 of the Act of May 5th, 1892) is unconstitutional.

Appellants claimed American citizenship as a defence to these proceedings, and the question arises whether the Commissioner had jurisdiction to determine that controverted question, particularly by the application of Section 3 of the Act of May 5th, 1892 (27 Stat., 25; 2 Sup. R. S., 13), providing that such person "shall be adjudged to be unlawfully within the United States, unless such person shall establish by affirmative proof, to the

satisfaction of such Justice, Judge or Commissioner, his lawful right to remain in the United States."

This Court has not hitherto, directly or indirectly, sustained the validity of such a provision as applied to persons claiming American citizenship. These cases raise the question: May this right to citizenship be ultimately determined before an inferior magistrate like a U. S. Commissioner, not holdng a Court of Record, not part of "the judicial power of the United States," in proceedings in which persons are arrested on warrants not based on oath, are to be deported unless they establish "by affirmative evidence" to the "satisfaction" of such magistrate their rights, may have their evidence, even when uncontradicted, disregarded, and are deprived of opportunities to establish their rights, pursuant to the ordinary law of the land?

This Court has held, on the one hand, that if the Chinese persons were born in the United States, these laws do not apply to them (U. S. vs. Wong Kim Ark, 169 U. S., 649). On the other hand, if they are conceded aliens, these provisions, no matter how drastic, apply, and are constitutional (Li Sing vs. U. S., 180 U. S., 486).

The Chinese Exclusion Laws rest on the constitutionally unrestrained power of Congress to deal with aliens, with respect to their exclusion, as it pleases, free from the restraints checking other legislation in other respects (Fong Yue Ting vs. U. S., 149 U. S., 698). Congress can lawfully forbid all aliens or any class of aliens to enter the

country; it can constitutionally vest the determination of the rights of aliens to be or remain here in executive officers, or quasi-judicial officers, instead of excluding them absolutely (Lem Moon Sing vs. U. S., 158 U. S., 538). But this is all on the theory that aliens are being dealt with. These methods of determining their rights have been sustained merely as modifications of the right to exclude aliens entirely. It is submitted that the question whether the prisoner be an alien or not, cannot constitutionally be left for determination to such inferior magistrate, not exercising any part of the "judicial power of the United States," and through proceedings sustainable only as to aliens, and violating the bill of rights, reversing the burden of proof, denying constitutional right to secure witnesses, as applied to American citizens.

As held by Judge WHEELER in U. S. vs. Yee Mun Sang, 93 F. R., 364:

> "The validity of this provision rests upon the power of Congress to exclude aliens from the United States, and to commit the decision of their right to come or to remain to executive officers (Nishimura Ekiu vs. U. S., 142 U. S., 651; Lem Moon Sing vs. U. S., 158 U. S., 538). This is because they are, in fact, aliens, and as such may be excluded, and not because the power to decide whether they are aliens or citizens has been or could be committed finally by Congress to customs officials or other executive officers. In this case the officers did not assume to decide that appellant was an alien, but assumed that he was such, and to decide that he was not so made to appear to be a merchant as to entitle him

> to admission to this country as an alien Chinese merchant, and excluded him from admission as such. This is doubtless final as to his character as a merchant in that respect. But citizenship of the country is a status of the person that is attendant at all times everywhere, and cannot be taken away, or but in a formal way, as provided by law, be renounced even by act of the person."

While Judge Wheeler was, it is true, merely considering a determination by a Treasury officer, the same rule applies to a decision reached by a U. S. Commissioner, not exercising any part of the "judicial power of the United States," and proceeding under the anomalous methods of treating aliens, embodied in our Chinese Exclusions Acts.

The national census from 1870 on shows that, pursuant to the invitation of our treaties with China, thousands of Chinese citizens of both sexes had settled in the United States before the first exclusion act was passed in 1882. The present record shows through the mouth of a Government witness that during this time many Chinese women lived in San Francisco (Chin Bak Kan Record, folio 21), and naturally many children were born in the United States of Chinese parentage. As more clannish and alien than other foreigners, these residents would naturally acquire little information about our doings, adopt our customs only in slight degree, and for business and family reasons frequently return to China for visits, often with their infant children to be educated or reared in China. Such

instances are neither rare (Wong Kim Ark case) nor improbable (U. S. vs. Lee Seick, 100 Fed. Rep., 398, C. C. A., 9th Circuit; U. S. vs. Jue Wy, 103 F. R., 795). This Court has decided that such persons, born here under such conditions, are citizens of the United States (U. S. vs. Wong Kim Ark, 169 U. S., 649). The present case raises the question whether their rights can be constitutionally determined along the lines of our Chinese Exclusion Laws by U. S. Commissioners, with the restraints upon due process of law attached to those proceedings, and the determination of an inferior magistrate declared binding, who has jurisdiction only, if his own ruling as to his jurisdiction be correct. It is submitted that the right to American citizenship can be determined only in the exercise of "the judicial power of the United States," by magistrates vested with part of such power, and acting in accord with the Constitution, and not upon the assumption that the alienage to be proved, exists at the threshold, and will sanction the extraordinary methods to be employed to reach that conclusion.

This Court has held that U. S. Commissioners are not "judges in the constitutional sense" (Rice vs. Ames, 180 U. S., 371, 378. Todd vs. U. S., 158 U. S., 278), and are not vested with any part of "the judicial power of the U. S." (Robertson vs. Baldwin, 165 U. S., 275, 278; re-affirming Martin vs. Hunter's Lessees, 1 Wheaton, 304, 330, and Chisholm vs. Georgis, 2 Dallas, 419, 475). Of course, U. S. Commissioners are not appointed in accord-

ance with the constitutional provisions concerning the U. S. Judiciary (Article II, Section II, Par. 2 and Article III, Secs. 1 and 2). It is submitted that under these authorities, U. S. Commissioners cannot be constitutionally vested by Congress with power to determine this issue of American citizenship.

A historical review, as gathered from the law reports, shows that the deportation procedure in Chinese Exclusion cases has not been sustained as an exercise of judicial power, but as a constitutional method of dealing with conceded aliens, whose rights might have been left for the determination of purely executive officers as lawfully.

In re Chow Gooi Poi, 25 F. R., 77, 79, 80.
Fong Yue Ting vs. U. S., 149 U. S., 698.
Lem Moon Sing vs. U. S., 158 U. S., 538.
Li Sing vs. U. S., 180 U. S., 486.
U. S. vs. Hom Sing, 48 F. R., 635, 638.
Wong Wing vs. U. S., 163 U. S., 227, 237.

In U. S. vs. Hom Sing, *supra*, Judge Coxe quoted with approval the language of the Court (Sawyer, Hoffman & Sabin JJ.) in the case of Chow Goo Pooi, 25 Fed. Rep., 77, in which this procedure section was first considered. In that case those judges said, regarding Section 12 of the Act of 1882:

> "The power exercised by the magistrate is a power summarily to investigate and determine the right of a person to enter or remain in the country—a power sometimes conferred on Commissioners of immigration, but by this

law confided to a 'justice, judge or commissioner.'"

Judge Coxe adds: "He (the U. S. Attorney) further compared the functions performed by the 'justice, judge or commissioner' with those which, by the same statute are conferred upon the collector of the port and those which by the 'alien labor and immigration act' (26 Stat. L., 1084) are conferred upon inspection officers. This position is entirely correct. The investigation is summary, and the functions of the commissioners are akin to those exercised by the collector and inspectors."

Thus wrote the very Judge who appointed and directed the conduct of the Commissioner, who decided these cases, and who himself affirmed those rulings on appeal. It would appear that the omission to make any findings on the disputed "citizenship issue" was by design, as involving a matter not regarded as vested in those officers under this statute to determine.

Moreover, in the very case in question, Judge Coxe ruled that there was no authority to take depositions of non-resident witnesses in these cases (U. S. vs. Hom Sing, *supra*). In fact, there is no authority to subpœna witnesses in this class of cases either, no more than the immigration officers possess. Section 1014, Rev. Stat., applies only to criminal proceedings; Sections 876 and 877 apply only to cases in Court, not to cases pending before Commissioners (Todd vs. U. S., 158 U. S., 278; U. S. vs. Hom Sing, *supra*). No other provisions apply. In the Fong Yue Ting case the minority Judges pointed out this absence of authority to compel the attendance of witnesses under the analogous non-registration procedure provision (149

U. S., 698, 742). The answer of the majority was, not that the power to subpœna existed, but that there is an unrestrained constitutional right to try aliens so. The right so to treat persons whose alienage is in dispute, was not affirmed. In fact, U. S. Commissioner Rowe in Jersey City has accordingly (in February, 1902) in a series of Chinese exclusion cases now being tried before him, refused to issue subpœnas for witnesses residing out of the district, following a ruling just made by the Comptroller of the Treasury that such subpœnaing is unauthorized.

Compare also the class of cases in which the Commissioner's right to punish for contempt committed before him, has been denied, because he exercises none of "the judicial power of the United States" under the constitution.

In re Mason, 43 F. R., 510.
In re Perkins, 29 F. R., 909.
Ex parte, Doll, 7 Phil., 595.

Compare

U. S. vs. Schumann, 2 Abb. U. S., 523 (Field, J.).

Of course, an appeal from the Commissioner to the District Court, where the case is heard on the record below, the Commissioner's finding regarded as at any rate presumptively correct, particularly on the facts, and where opportunity to introduce new evidence according to the law of the land is withheld, is no substitute for the due process of law such alleged citizens are entitled to, to have their claims to citizenship determined.

We accordingly submit that the question of American citizenship cannot be lawfully left for determination in this class of cases, to an inferior Magistrate like a U. S. Commissioner, not holding a court of record, not exercising any part of the "judicial power of the United States" (Const., Article III, Section 1; Robertson vs. Baldwin, 165 U. S., 275), in proceedings in which there is no authority to secure the appearance of witnesses or otherwise secure due process of law, and that Section 3 of the Act of May 5th, 1892, as applied to persons claiming American citizenship is unconstitutional and contrary to due process of law, in requiring defendants in these cases by affirmative evidence to prove the necessary facts to the satisfaction of such inferior magistrate, after denying adequate opportunities to secure the evidence that may be requisite, and on the other hand, compelling the Government through its Chinese inspectors to secure its voluntary witnesses by tempting their cupidity by the offer of pecuniary or other rewards, to testify falsely in accord with the Government's position in these cases. Nor should the circumstance be overlooked that every proposed Chinese witness is himself subject to arrest and liable to be deported without cause, if he meets with Government disfavor, so that the Chinese inspectors maintain a reign of terror among the Chinese, inconsistent with giving honest Government evidence in these cases, and bound to elicit false testimony. This is not due process of law (Wing Wing vs. U. S., 163 U. S., 228; Holden vs. Hardy, *supra*).

POINT IV.

Even apart from defendants' claims to American citizenship, the burden of proof provision should not have been applied to them because it was repealed by Article IV of the Treaty of 1894.

Article IV of the Treaty of 1894 provides:

> "In pursuance of Article III of the Immigration Treaty between the United States and China, signed at Pekin, on the 17th day of November, 1880 (the 15th day of the tenth month of Kwangh sü, sixth year), it is hereby understood and agreed that Chinese laborers or Chinese of any other class, either permanently or temporarily residing in the United States, shall have for the protection of their persons and property all rights that are given by the law of the United States to citizens of the most favored nation excepting the right to become naturalized citizens. And the Government of the United States reaffirms its obligation, as stated in said Article III, to exert all its power to secure protection to the persons and property of all Chinese subjects in the United States."

This article became law subsequent to the Act of 1892. It is submitted that, inasmuch as there is no such burden of proof provision in force with respect to any other nation, this treaty has superseded the third section of the Act of May 5th, 1892, and thereby afforded protection to the persons of such Chinese individuals. This is in line with the decisions of the Courts relative to Article III of the Treaty of 1880, and this provision of the Treaty of 1894.

In re Quong Woo, 13 Fed. Rep., 229, 233 (Field, J.).

In re Ah Chong, 2 F. R., 733, 737–9.

In re Parrott, 1 F. R., 481, 485, 498.

Yick Wo vs. Hopkins, 118 U. S., 356, 368–9.

U. S. vs. Wong Kim Ark, 169 U. S., 649, 702.

Storti vs. Mass., 183 U. S., 138.

Compare Foreign Relations, 1893, pp. 263-4.

POINT V.

Appellant's American citizenship is established on the facts.

(1) The question of citizenship being a jurisdictional one, this Court is not bound by any finding against it that may be spelled out of the record.

In re Mayfield, 141 U. S., 107.

Cuday, Petitioner, 131 U. S., 280, 286.

Ex parte Farley, 40 F. R., 66–68.

Even on appeal in *habeas corpus* proceedings, the lower Court cannot make conclusive findings of fact on jurisdictional questions, shutting out review of the facts.

Johnson vs. Sayre, 158 U. S., 109, 115-116.

(2) In fact there is no finding in the record on this material question in issue, and its absence nullifies the order of deportation.

Saltonstall vs. Birtwell, 150 U. S., 417.

The errors attending the Commissioner's consideration of the cases are indicated by his finding, wholly without evidence, that defendants are laborers.

(3) There is no jurisdiction to pass on the question of citizenship in these proceedings.

(See Point III.)

(4) In the Chin Ying case, the legal evidence as to American citizenship is direct, persuasive, and even uncontradicted.

(See Statement of Facts, *supra.*)

In the Chin Bak Kan case, it is contradicted merely by the evidence of a voluntary witness produced by the Government who first swears falsely that he was never a Government witness in another case before, then admits the contrary, and who displays a wonderful amount of suspicious unexplained knowledge about the defendant's family and place of residence in California, while he is ignorant of everything else. It is submitted that his knowledge of the facts was acquired solely from a perusal of the prior evidence given by the witness for the defence, and under temptation arising from compensation to be secured through the Chinese Inspector for his voluntary appearance to testify against one of his compatriots, or fear.

POINT VI.

Aside even from the citizenship issue, defendant's right to remain here was established.

(*a*) Even if the procedure section be in force, as Article III of the Treaty has made the production of the certificate optional, there is no right to deport defendants for non-production of the certificate referred to in the complaints, and the evidence does not in the slightest degree justify the view that defendants are in fact laborers. That finding means merely that they did not produce the certificate deemed by the Commissioner, erroneously, as a matter of law, necessary to distinguish them from laborers.

(*b*) Assuming that defendant Chin Ying was successfully connected by the Government with the applicant Sum Jim, his right to enter as a returning merchant was established.

All the facts requisite under Section 2 of the Act of Nov. 3, 1893, were established (Li Sing vs. U. S., 180 U. S., 486). Nor are they contradicted.

Under Section 3 of the Act of 1892, even if he was rejected, his right to remain here was to be determined by affirmative evidence, in these judicial proceedings, independently of any action by the Collector. The Collector's action cannot be reviewed in the Courts in order to reverse the same, and to admit applicants (Lem Moon Sing vs. U. S., 158 U. S., 538), but in the case of a Chinese person found actually within the United States and arrested here, in judicial proceedings for his de-

portation, his rights are required to be investigated *de novo* and his right to be and remain here must be established by AFFIRMATIVE EVIDENCE under Section 3 of the Act of 1892, without reference to any prior decision pro or con by customs officials.

> "The judgment of the collector of customs did not preclude the Commissioner, and the latter had authority under the statute to hear and determine the question whether Li Sing was entitled to remain within the limits of the United States. The decision of the collector of customs not being conclusive as to the right of the petitioner to enter the United States, much less as to his right to remain therein, we are brought to consider the errors assigned."
>
> Li Sing vs. U. S., 180 U. S., 486, 490.

Directly in accord with our contention are the cases of

> U. S. vs. Chin Fee, 94 F. R., 828 (Wheeler, J.)
> U. S. vs. Wong Chung, 92 F. R., 141 (Coxe, J.).

The very terms of the Act of 1894 (28 St., 390), show that it deals only with actual exclusion, not with judicial inquiries, in cases of alleged unlawful entry.

Moreover, the record shows that an appeal to the Secretary of the Treasury was taken from the action of the collector. Such determination by

the collector, thus superseded, is not binding on the Courts.

In re Gin Fong, 89 F. R., 153.
U. S. vs. Wing Chung, 92 F. R., 141 (Coxe, J.).
In re Monaco, 86 F. R., 117 (Lacombe, J.).
See acc. Passavant vs. U. S., 148 U. S., 214.

The orders appealed from should be reversed.

Respectfully submitted,

B. LEWINSON,
MAX J. KOHLER,
Of Counsel for Appellants.

Reply Brief for Citizen Defendants

S. LEVITAN,
SAM J. KOHEN,
Of Counsel for Citizen Defendants.

In the Supreme Court of the United States.

THE UNITED STATES, Appellant, vs. LEE YEN TAI, Appellee.	No. 503.
CHIN BAK KAN, Appellant, vs. THE UNITED STATES.	No. 525.
CHIN YING, Appellant, vs. THE UNITED STATES.	No. 526.

REPLY BRIEF FOR CHINESE DEFENDANTS.

I.

As to the Facts.

We desire earnestly to object to the attempt by the Government to inject alleged facts into these cases, not in evidence. In the Chin Bak Kan case, the Gov-

er nment,—not the defendant—offered in evidence, the registration certificate issued to the witness for the Chinese defendant, and it was received in evidence (p. 5) and is summarized in the Record (p. 5). It contains no statement as to date of arrival of said witness in the United States, nor length of residence here. The Government did not offer in evidence the application papers from the files of the office of the Collector of Internal Revenue, upon which this certificate was supposed to have been issued, and laid no foundation for the introduction of such alleged impeaching evidence, by calling it to the attention of the witness, or even asking him or any one else to identify his signature thereon. The date of the arrival of the uncle therein specified,—for which it was offered, relates to purely collateral, matter, the date of the uncle's arrival in the United States not going to the issues herein. The alleged application paper for the issuance of the certificate was produced by the Government, but marked "for identification" only (Record, p. 10), and was not introduced in evidence, and is not in the Record. It requires no argument to show that a paper received "for identification" only, is not received in evidence, and this very record preserves the distinction, for the certificate which was received in evidence, was properly marked as an exhibit, not for identification (p. 5). The statement in the Government's brief (pp 3-4) that there is a conflict between the statements made by this witness himself as to the date of his arrival in the United States is thus without support in the evidence, as also all the arguments based upon it. In fact, the Government did not even offer this application paper in evidence.

Nor is the statement in the Government Brief (p 3)

correct, that the uncle of this defendant testified that the defendant was born in the United States in the *first* year after arrival of the parties, which would make him 25 years old, accepting the uncle's statement on the trial of arrival in the United States 25 years ago, while elsewhere in his evidence he says the defendant was born 22 years ago. The latter evidence as to birth in the United States 22 years ago does appear, and in fact twice in the record in accord with American and Chinese dates (pp. 4, 6). The Government has misconstrued the uncle's evidence (p. 4). "I knew him (defendant) for the first seven years I was there in San Francisco" into a declaration that the defendant was known to the witness the first year the witness arrived in San Francisco. What the witness means and says—and this accords with all the rest of his evidence, is that "I knew him for the first (time) seven years (while) I was there in San Francisco"; the witness obviously distinguished between this and the other periods of his acquaintance with defendant, when he saw him in China. He had repeatedly testified that the boy was not born till 22 years ago (before 1901), and therefore, three years after the witness arrived in the United States, and was 22, not 25. As the witness and defendant's parents resided ten years in California, this three-year interval was deducted from ten to make seven years. But, even if the date mentioned in the application paper of the uncle—not called to his attention and not shown to have been knowingly given by him,—of his arrival in the United States be correct, and he and his sister and brother-in-law came here in July, 1879, and not in 1876, it does not contradict the claim that the defendant was born that year in the

United States, and was 22 in 1901. This application shows, however, clearly where the Government witness obtained his information from, as to the date and steamer of arrival of the defendant's witness in the United States. Instead of remembering these precise facts relative to a man theretofore a stranger to him, occurring over twenty years ago, this voluntary Government witness, otherwise discredited also, as already pointed out, was obviously "coached" by the Chinese Inspector with the aid of this application paper.

2nd: Apart from the fact, however, that the application paper was not sufficiently identified, related to collateral matter which cannot be contradicted and that no foundation for its use as impeaching evidence was laid, even the non-introduction in evidence of this application paper is explained by the rulings of Judge COXE, made about this very time, that such application papers are inadmissible, which ruling was binding on the Commissioner. The circumstances and regulations governing the making of these applications for registration, and prescribing their form, are set forth in the Treasury Department's Regulations, dated November 25th, 1893 (Synopsis Treasury Decisions, No. 15542½). Judge COXE properly construed these, as not constituting admissions knowingly and intelligently made by the applicants. The application for registration is required to be in the shape of an affidavit by applicant in the English language, to be sworn to by him before the Deputy Collector. The circumstances quite invariably show that the applicants do not understand or read English, nor can the Court presume that the Deputy Collector is a master of Chinese; yet regula-

tions required the applicant to sign these English papers, though ignorant of their contents. No provision for the use of interpreters was made, but, on the contrary, the oath was required to be administered by the Deputy Collector. No method of communicating the contents of the papers, or verifying the same, was devised, but a mere formal document bearing a meaningless signature was thus coerced. The Note appended to the certificate indicates this more fully; it is as follows:

> "NOTE. If the applicant can sign his name in English it is preferred that he should do so. If he cannot sign in English let him sign in Chinese characters, the deputy collector in that case writing the English equivalent underneath the signature. If the applicant cannot write his name at all, let him make his mark in the usual form."

The record in this very case shows that this witness was not a master of English, and had to testify through an interpreter (p. 3). Thus it will be seen that the Government is seeking now to introduce in evidence, papers not offered at all below, if for no other reason than because the ruling of Judge COXE that they are inadmissible, was acquiesced in by the Government without objection or exception. Moreover, not being introduced in evidence nor called to the attention of the witness, he had no occasion to explain the alleged discrepancy.

3rd: Moreover, the suggestion in the CHIN YING case in the Government Brief (p. 6) that Chin Ying "was in fact a laborer and laundryman in Mott Street, New York," is unjustified by anything in the evidence. In fact, all the learned Assistant Attorney General

ventured to assert as to this, is that " the Government officers were well assured " of such facts, not that there is any evidence accordingly. The statement is also erroneous (Gov. Brief p. 6) that the uncle " became alarmed when the Mott Street address was brought out." Reference is prayed, as negativing this, to the Transcript of Record. As to the suggestion that this witness would not positively deny that Chin Ying had lived in Mott Street, or been a member of a mercantile firm there, but merely stated he did not know, and did not know where he had been in 1895 or 1898, although he had previously testified that Chin Ying had been in China since he was ten (Brief, p. 6) the fact is that the witness' attention on his cross-examination doubtless was directed to the fact that he had testified to matters partly beyond his personal knowledge, since he could not know of his own knowledge where Chin Ying was, when the witness was elsewhere, and on this cross-examination thereafter, possibly testified more guardedly as to matters as to which he disclaimed personal knowledge.

4th : Moreover, it should be observed that there is nothing inconsistent between the merchant claim and the citizenship claim, and the various statements made on each of these occasions. In order to create a conflict, the Government Brief (p. 7) suggests that the admission in the Chin Ying case that defendant was " a Chinese person and not a member of the exempt classes," while " consistent with the native-born claim " is " inconsistent with the claims alleged to have been made by this defendant in 1897 and 1899 that he was a merchant ". This is an error, arising out of a misconstruction of the term " exempt classes." This was simply an admission that defendant was not a

member of the diplomatic or official class, made "exempt" from the provisions of the Act by Section 13 of the Act of July 5th, 1884, where that very term "exempt" is used. The admission means, and was intended to mean, nothing more. Merchants were regarded under the statute as "privileged to enter," not as "exempt." The Commissioner's Judgment of Deportation (p. 12) shows clearly that this was the meaning of this stipulation, for the Commissioner expressly recites the fact of Chin Ying's "not being a diplomatic or other officer of the Chinese or any other Government." In view of the provisions of Rev. St. 4062–4, making it a crime to issue process against diplomatic officers, this was a reasonable concession, made for the Commissioner's and Government's protection.

II.

(a) The Government's Brief apparently, though vaguely, suggests in several passages that this Court is confined to treaty (and constitutional) questions on the appeals in the Chin Bak Kan and Chin Ying cases, because the appeals were taken direct to this Court from the Circuit Court of Appeals, under Sec. 5 of the C. C. A. Act (Brief pp. 8, 10). It is, of course, well settled that on such appeals, the whole case is open for consideration here, and not merely treaty (and constitutional) questions.

Horner vs. U. S., 143 U. S. 570, 576.
Chappel vs. U. S., 160 U. S. 499, 509
Scott vs. Donald, 165 U. S. 58, 71.
Holder vs. Aultman, 169 U. S. 81, 88.

(b) Nor are these two cases, cases where review is limited to questions cognizable on *habeas*, as suggested by the Government (pp. 9, 10); appeals were here sued out, not writs of *habeas corpus* and the very distinction suggested in the cases relied upon by the Government, applies. All the questions open for review on an appeal, as distinguished from a writ of error, are open here, though in fact, nearly all the questions raised go to the Commissioner's jurisdiction, and of course are open here (Great Southern Co. vs. Jones, 177 U. S. 449, 453).

(c) Nor is the citation of the Fong Yue Ting case on the point that supposed "formal objections merit no attention" (Government Brief, p. 9) relevant: *(a)* because the Chin Bak Kan and Chin Ying cases are appeals, not *habeas* cases *(b)* because the objections under the later statute, in any event, are not formal but jurisdictional *(c)* because other and later statutes than were involved in the Fong Yue Ting case make a sworn complaint jurisdictional.

(d) Moreover, even on *Habeas*, as suggested in one of our principal brief (Chin Bak Kan Brief, p. 27) on an issue like that of citizenship, going to the jurisdiction of the Commissioner, even the facts are reviewable, due allowance being made for certain advantages of judging as to credibility possessed by the trial judge, where the facts are conflicting.

(e) The claim made by the Government in its Brief on the Motion to Vacate bail that a *Habeas Corpus*, even to review the jurisdictional questions raised by the Certificate in the Lee Yen Tai case, (pp. 7, 9-10) is unauthorized, seems to be abandoned in its Brief on

the merits. The claim is obviously untenable that *Habeas* is unauthorized to attack jurisdiction in Chinese Exclusion cases (*In re* Li Sing, 86 F. R. 896, Li Sing vs. U. S. 180 U. S. 486, U. S. vs. Jung Ah Lung, 124 U. S. 621, Wong Wing vs. U. S. 163 U. S. 228, Fong Yue Ting vs. U. S. 149 U. S. 698). Also that an order of imprisonment, null for want of jurisdiction in the district where made, by some miraculous process, becomes valid when the prisoner without his consent is carried into another district (Carter vs. McClaughry, 183 U. S. 365, *Ex. p.* Young, 50 F. R. 526, *Ex. p.* Farley, 40 F. R. 66, 68, U. S. vs. Rogers, 23 F. R. 658, 662, *Ex. p.* Clarke, 100 U. S. 399, *In re* Farrell, 51 F. R. 213).

III.

The Treaty Negotiations Reviewed.

The Government's Brief considers at considerable length, the negotiations leading up to the treaty of 1894, including partially unpublished correspondence, but they do not change the situation, nor in the slightest degree militate against the view that the treaty was intended to meliorate the statutes. Significant is the concession made that the unratified treaty of 1888 is substantially the same as the treaty of 1894 (Government Brief, p. 37, also p. 26). This is in line with the expressed intention of both parties in 1893-4 to go back to the treaty of 1888 as a basis of negotiation (Government Brief, pp. 30, 31, 32), with the registration provisions of our statutes, subse-

quently adopted, tacked on, after the conclusion of the negotiation in 1893–4 as to the elimination or continuance of the latter. The suggestive fact is, that notwithstanding the passage of the Act of 1892 with its oppressive burden of proof and other provisions applicable to Chinese immigration, as well as registration, both parties consented, in 1894, to go back to the adjustment of 1888, which concededly was in the form of a self-executing modification and melioration of our statutes in some respects.

What was gained or lost in the negotiations of 1888 was immaterial, those matters were settled then, and remained as then adjusted. Naturally in 1893–4 there was no occasion to discuss those provisions and their meaning anew. The intention of the parties and the meaning attached to these provisions when drafted, in 1888, is therefore of the greatest significance. The correspondence in 1893–4 deals almost wholly with the question of the retention or elimination of the registration provisions; the other questions were determined when the draft of 1888 was accepted. Ultimately, as shown by the Government, China was compelled to acquiesce in the retention of the registration provisions, and hence Article V of the Treaty was drafted, dealing with these provisions.

Before further considering the correspondence of 1888, however, it should not be overlooked that the Treaty of 1894 was entered into as shown by the Government citations, at the instance of China (p. 27), whose Minister expressly suggested (Nov. 8, 1893):

> "In view of all the facts I would respectfully inquire whether it is now the intention of the United States to permit those serious questions to rest as a finality upon the legislation of Con-

> gress as it now exists, or whether the thought is entertained of further negotiation through a different source, to the end that all the existing difficulties between such nations may be permanently settled, and their honor, dignity and friendship maintained and preserved. If the Government of the United States desires to entertain and consider any negotiation whatever that may lead to an adjustment of the questions involved, I will willingly join in an interview upon that subject."

It should be observed that, in the Government Brief, where this passage is quoted, passages from this letter, immediately preceding this passage, in which China protested against clauses in these acts, are omitted, as indicated by the asterisks. In fact, from 1882 on, China constantly protested against our statutory provisions as violations of treaty, as shown by our "Foreign Relations." But a treaty adjustment, in place of the objectionable subsisting statutes, was now sought, as shown clearly by this letter of November 8, 1893.

The adoption of the unratified treaty of 1888 as a basis of negotiation by each side followed. Secretary Gresham joined in China's request for the negotiation of a new treaty as a substitute for the statute, by writing in January, 1894 (Gov. Brief, p. 31):

> "Earnestly desiring to strengthen the friendship which has so long existed between the United States and China and to promote the highest good of the people of both countries, I am ready to continue negotiations with you for a convention on the basis of the draft treaty of 1888."

China thus requested, and our Government conceded, concessions by treaty, to take the place of the statutory

enactments of our country. The Government's Brief shows clearly that the desire of China to have the registration provisions eliminated was not acquiesced in, but in other respects, the agreement reached in 1888 was adopted by both states, notwithstanding the intermediate passage of the burden of proof provision (Sec. 3 of the Act of 1892), which China specifically protested against. (Senate Executive Documents 52nd Congress, 2nd Session Document No. 54.)

The Government's contributions to the Treaty Correspondence in 1893–4 fail to shake any of the following propositions, based upon the Correspondence of 1888, and referred to in our brief in the Lee Yan Tai case :

(1) The changes in the draft of 1888, in Article III. (preserved in the treaty of 1894), substituted permissive language for mandatory terms as to the certificate for non-laborers, because the certificate was not designed any longer to be the sole permissible mode of proving that applicant was not a laborer. The Treaty Correspondence and changes in the Drafts, quoted in our Lee Yen Tai Brief (pp. 32, 30–1, 39–40) show such intent clearly.

(2) The other clauses of the treaty bear this out, Article I. being the only one using words of absolute exclusion, and that only as to laborers, Article II. having been amended by the Senate after the Jung Ah Lung decision, by adding the last sentence, found in the treaty of 1894, making the laborer's return certificate mandatory and exclusive, and the permissive language of Article III., without such change, being preserved, thus authorizing the admission of non-

laborers, even without production of the treaty certificate.

(3) The Treaty Negotiations of 1888 show unmistakably that China objected to judicial hearings in these cases after entry (Lee Yen Tai Brief, p. 32). Nothing indicating a change of intention in this respect by either parties, in the course of the subsequent treaty negotiations, is pointed out.

4th But China's motive, in desiring a new treaty in 1888, was obviously to meliorate the law. Counsel for the Government errs, when he says in his brief (p. 37): "The return privilege of registered laborers was the striking feature of both treaties" (1888 and 1894). This was not the case with regard to the Treaty of 1888 when signed in that year. Aside from the verbal inaccuracy as to "registration"—which was not made general even as to laborers till 1892—it should be observed that the draft treaty of 1888 did not materially change the prior law, in providing for entry by certain returning-laborers (See text, Gov. Brief, p. 70). The Acts of 1882 and 1884 authorized the *return* of laborers, and it was only after the treaty of 1888 was rejected, that their return was absolutely prohibited, by the Act of October 1st, 1888. The fact is that the Treaty of 1888 was invited by China, for the benefit of her subjects, and it was intended and understood by both sides to meliorate the law. This is clearly expressed by U. S. Minister Denby, in reporting to our Government the substance of an interview he had with the Chinese Yamen, Sept. 17, 1888, in which he sought to secure China's ratification of this Treaty before the President

signed the Act of Oct. 1, 1888. Mr. Denby said (Foreign Relations, 1888, Vol. I. p. 351):

> "China and not the United States had proposed the new treaty. That the sole object of the treaty of 1880 was to exclude Chinese laborers. That the treaty of 1888 changed the word 'suspend' to the word 'prohibit' and limited the effect of the treaty to 20 years. That this constituted the only difference between the treaties (1880 and 1888), *except so far as the latter favored China in other clauses.*"

(b) Some slight inaccuracies in the Government Brief as to the Treaty Negotiations may further be referred to.

(1) Some novel grounds are now suggested (p. 23-5) by the Government for China's failure to ratify the treaty of 1888; the true grounds were mentioned in the President's memorandum of approval of the Act of October 1st, 1888 (Foreign Relations, I. 356-9), and the Communications between China and the United States of that period in the point (*Id.*, 352, 354, 403). They were that China wanted the law limited to 10 years instead of 20 years, and objected to the Senate Amendment (*Id.*, p. 312) by which Article I. was expressly made applicable to Chinese laborers who had already left the United States, and could not therefore secure the certificate obtainable only before leaving this country. The former of these demands was conceded in the treaty ratified in 1894.

(2) These facts also incidentally throw doubts on the correctness of the Government's irrelevant contention (p. 26) that "This correspondence shows that the Chinese authorities, and not the Government of the

United States, were responsible for the failure of the treaty of 1888."

(3) The reference in the Government Brief to the letter from the Chinese Minister to Secretary Gresham (p. 28) antedates the *ratification* of the Treaty of 1894; of course, at that time, the Acts of 1892 and 1893 were regarded as in force. Moreover, as our Executive Department denied China's construction of the Treaty of 1894, representations to our Government that entry of particular persons was authorized, even on the basis of our Government's construction, were naturally in order.

(4) The recitals China desired to have inserted in the Treaty of 1894 (Gov. Brief, pp. 74, 30, 32) as to annulments of all acts of or subsequent to 1888, were of course necessarily eliminated (Gov. Brief, p. 30) when China yielded to our demands that the registration provisions should stand. It was the recital of the rejected demand for the annulment of the registration provisions that our Government objected to, and there would have been such a recital if the language of the draft had been retained as to "the annulment by the Government of the former (U. S.) of all the legislative measures enacted in and since the year 1888, affecting the coming of Chinese subjects into the territory of the United State and their residence therein" (p 74).

(5) The Government's claim (p. 55) that a recital in the first draft of the treaty of 1888, submitted by China, was an assent to the continuance of our statute, is clearly erroneous, as appears from an examination of the draft (p. 78). It shows that the "acquiescence to the recent legislation of the United States aforesaid" refers specifically only to the "law providing for the registration of such Chinese."

IV.

Some Government Criticisms Considered.

1st It should be observed that the Li Sing case (180 U. S.) did not involve any consideration of the treaty of 1894 nor of citizenship claims, nor were any of the points here raised suggested even in the remotest manner in the Gue Lim (176 U. S) case. No case in any way considered the treaty, of those cited in the Government Brief, as holding treaty and statutes to be consistent with each other (p. 20), except that in U. S. vs. Yong Yew, 83 Fed. Rep. 832, the treaty is in part quoted, without consideration thereof.

2nd, The Government's Brief (pp. 46–7) proceeds upon a misapprehension of our purpose in citing in our Lee Yen Tai Brief (p. 2) the case of Mrs. Gue Lim. We referred to that case (176 U. S. 459–467) for the passage quoted at length on p. 26 of the same brief, showing that the certificate for the privileged classes was prescribed, even in the Act of 1884, merely to distinguish them from laborers, not to exclude non-laborers. Under the statute of 1884 and the treaty of 1880 such non-laborer arriving without a certificate, was conclusively presumed, as a matter of law, to be a laborer, for the Treaty of 1880, which the Acts of 1882 and 1884 were intended to execute, authorized only the exclusion of laborers. As we claim that the Treaty of 1894 has made this certificate merely optional, (see Lee Yen Tai Brief pp. 36–41), one not producing the statutory certificate cannot, we claim, any longer be regarded *ipso facto* as a laborer. This question is of great importance in these cases, even independently of the

claim that the Treaty has repealed the procedure section for the deportation through judicial proceedings even of laborers. In all three cases the complaints charged defendants with having entered without the certificate prescribed by law. If non-laborers need no longer produce a certificate, these complaints state no cause of action, but proceed upon the erroneous conclusion of law that a non-laborer entering without the certificate is still conclusively presumed to be a laborer. In the Chin Bak Kan and Chin Ying cases the evidence is all in the records, and shows that there is not a particle of evidence to justify the Commissioner's holding that these defendants are in fact laborers. His holding is obviously based solely upon this erroneous conclusion of law, and should be reversed, if only on this ground. In the Lee Yen Tai case, the specific averments in the petition for the *habeas* as to defendant's mercantile status, are not met by any evidence or denial, and are not negatived by the judgment of deportation, reciting this erroneous conclusion of law upon the charges of the complaint. The averments of the petition therefore stand admitted. This is the rule of practice in habeas cases established by this Court (Whitten vs. Tomlinson, 160 U. S. 231, 242). The jurisdiction of the Commissioner to order deportation of a merchant entering without the merchant's certificate is therefore the precise question in that case, raised by the facts set forth in the Certificate, and possibly the question certified calls for no answer except as to jurisdiction over merchants not producing any certificate.

3rd We are charged with making "statements that are doubtless unintentional errors" (pp. 49–50) in cit-

ing Treasury Decisions of Feb. 7, 1899 and April 14, 1899 as holding that commissioners have *no* jurisdiction in non-registration cases, not being U. S. Judges. Counsel for the Government's characterization is based upon his statement that "I (he) am unable to find these decisions or any other rulings of the Treasury Department holding to that effect." Counsel's inference is, of course, a *non-sequitur*. Rulings to the effect stated were published by the Treasury Department in its compilation of Treasury Laws and Decisions entitled "Digest of Chinese Exclusion Laws and Decisions," 1899, p. 46, disapproving of the California decision to the contrary referred to by us and quoted in the Government Brief (p. 17). The same ruling against the Commissioner's jurisdiction, appears to have been made in the Treasury Department's "Synopsis of Rulings and Decisions," published already in 1896, p. 13.

The case of *in re* Wong Fock 81 Fed. Rep. 558, cited on this point by the Government, is the very case referred to in our Lee Yen Tai brief (p. 15) as the one which Judge LACOMBE refused to follow in March, 1898, though called to his attention by the Government in the case of U. S. vs. Sing Kin San, when he ruled orally that a U. S. Commissioner is not a U. S. Judge within the meaning of Section 6 of the Acts of 1892 and 1893. Judge LACOMBE according ruled that he himself would have to try that case under Section 6, and that the Commissioner had no jurisdiction; this is within the personal knowledge of counsel. This is in line with the many decisions of this Court on the point, cited in our Lee Yen Tai Brief (p. 15), including the Fong Yue Ting decision (at p. 728) on the precise point. The Government con-

tention (Brief p. 16) that there is a collocation of the words "justice, judge and commissioner" in the Act of 1892 which should be supplied in section 6 also, runs directly counter to the principle of law "*expressio unius.*" In the earlier sections of this act—referring only to unlawful entry cases, (Fong Yue Ting case pp. 725–6)—these three terms are used, because they were found also in the earlier procedure section (Sec 12 of the Act of 1884) which Section 1 of the Act of 1892 continued in force. But in the newly-created non-registration procedure, only "United States Judges" were designated by Section 6, obviously because Commissioners were not intended to be authorized to act by a statute itself so clearly making and noting the distinction between these offices. As held in the Fong You Ting case (p. 728) :

> "The designation of the judge, in general terms as 'United States judge," is an apt and sufficient description of a judge of a court of the United States, and is equivalent to or synonymous with the designation, in other statutes, of the judges authorized to issue writs of habeas corpus or warrants to arrest persons accused of crime" (Rev. St., 752, 1014).

We do not understand the Government to claim that U. S. Commissioners can issue writs of habeas corpus, nor that the extraordinary contention was sustained in any court that a U. S. Commissioner is a United States judge, except in the case in 81 Fed. Rep., 558, cited by the Government.

In the Government's Brief on the Bail Motions (pp. 17–18) it was intimated that these orders by Commissioners in the unlawful entry cases under consideration

might be sustained, as if made under Section 6 of the Acts of 1892 and 1893 by a U. S. Judge for non-registration, in order to invoke an alleged statutory prohibition of bail. This claim we sought to refute on various grounds (Lee Yen Tai Brief, pp. 15, 16). The Government now apparently acquiesces in our view that here these sections are irrelevant, at least for the reason that "these men are not proceeded against strictly as non-registered laborers" (p. 18). We discussed the matter at some length for the further reason that we desired to make it clear that Article V. of the Treaty continues in force only these severable and distinct registration provisions, and not the sections here involved, and because the question is directly involved in other appeals taken to this Court.

The Government's new suggestion (Brief, p. 18), that after the Commissioner had acted, a U. S. Judge had made an order of deportation, sustainable under the non-registration provision, is erroneous: (*a*) because the cases came up on appeal only, as unlawful entry cases, under Section 13 of the Act of Sept. 13, 1888, and the facts and requirements under section 6 were not under consideration; (*b*) because on the appeal, the case was before the District Court, not before the judge having jurisdiction under Section 6 (Fong Yue Ting case, 149 U. S., 698, 728; U. S. vs. Gee Lee, 50 F. R., 271). (*c*) Because concededly these men were not laborers within the United States in 1892 and 1893, who alone were required to register (See our Lee Yen Tai Brief, p. 15.)

4th. It should be observed that the Quock Ting case (140 U. S., 417), cited by the Government, on the facts as to citizenship, is distinguishable, because there the

applicant, *in habeas corpus proceedings*, showed such lack of knowledge of San Francisco affairs as this Court deemed inconsistent with his claim that he had lived there during the first ten years of his lifetime, especially in connection with his suspiciously detailed knowledge of the supposed facts as to his leaving, and that the interested evidence of the father, who remained here for years after shipping his family to China, was devoid of any corroborative circumstance, and no one else, less interested, was examined in the city of the alleged residence of father and son.

5th The Government also relies on the case of

In re Louie You, 97 Feb. Rep. 580

quoted in the Government Brief (p. 14). It is following a case like this, that is responsible on the facts for the decisions rendered below. We challenge the correctness of this decision, in which without even statutory authority evidence is disregarded, which is not discredited or improbable, but simply avowedly because it is Chinese evidence. See decision to the contrary on this point, concurred in by Mr. Justice McKenna 100 F. R. 398 (C C A) On the citizenship issue, such discrimination is, we contend, unconstitutional. From the nature of the thing, corroboration by white witnesses is practically impossible upon such issues. Congress has established no such rule of evidence, and it is submitted that such a law would be unconstitutional (Wong Kim Ark Case, 169 U. S. 649 Fong Yue Ting Case 149 U. S. 698, 742). It is like throwing the burden of proof on a citizen in cases affecting his most sacred rights, and at the same time forbidding him to introduce any evidence to meet such burden. Such rulings would deprive thousands of unfortunate

American citizens of Chinese extraction of their constitutional rights. Tha correct rule of law applicable, directly contrary to the case relied upon by the Goverment, is laid down in the cases of U. S. vs. Yee Mun Sang, 93 F. R. 365, and U. S. vs. Jue Wy, 103 F. R. 795. The language used in the Yee Mun Sang case, *supra* is a correct exposition of the law, in a similar case, involving the same circumstances:

> "The testimony as to his place of birth is not preposterous or unnatural, and cannot justly be rejected, although it cannot be contradicted, if not true. It must be weighed as lawful evidence in any case must be. When so weighed, it appears to prove the fact."

V.

Appellants' Claims to Citizenship are not Inherently Unreasonable or Improbable and Required Different Treatment than Accorded below.

The Government's Brief and oral argument referred to the alleged improbability of these claims to citizenship, presented by persons of the Chinese race, returning to the United States, after absence from infancy on. It is submitted that there is nothing inherently improbable or unreasonable in such claims.

Some facts which the Court will take judicial notice of, are here material. In 1860, there were 34,933 Chinese persons in the United States; in 1870 there were 63,199 (49,000 in California); in 1880 there were 105,465 (75,132 in California); (Compendium of

the Tenth Census of the United States, I., p. 334). The Census of 1890 shows that there were then 106,000, which number had fallen to 93,000 in 1900, according to the U. S. Census of that year. That many of the Chinese inhabitants of California during the decade between 1870 and 1880 were women, is testified to in the Chin Bakkan case by a Government witness (Record, p. 13). Of course, many children were born to them, particularly in California, who under the Wong Kim Ark case are citizens of the United States. The Government has, moreover, published a table of figures (Senate Executive Document No. 54, of the 52nd Congress, 2nd Session), prepared by the Collector of Customs at San Francisco, showing that at that port alone, 32,090 more Chinese persons had departed from the United States from 1882 to 1891 than had arrived. The Act of Oct. 1, 1888, prohibiting the return of Chinese laborers, even though they had left the United States with papers authorizing return, deprived thousands of laborers of their privilege of re-entry. As the law was made more stringent as to merchants, thousands of these also were unable to secure the necessary consents from executive and consular officers to permit them to return. Moreover, for many years, minors were excluded because, until this Court decided the Gue Lim case (176 U. S., 459), they could not secure the inappropriate certificates, and were erroneously treated as forbidden to enter without them. The figures above quoted indicate beyond question also how common it was for Chinese residents of the United States, whether for business, family or sentimental reasons, to re-visit China with their children from time to time, with the intention of returning. When right of the parents to return was cut off, the education of their

children, American citizen though they were, had to take place till they reached man's estate, in China, where the parents per force had to reside. Under such circumstances, is it strange or improbable that Chinese minors, born in the United States, who left with their parents, should after years return to this land of promise, and be looked out for by their uncles or other relatives, when they arrive here? It is submitted that there is nothing unreasonable or improbable in this claim. Of course, when even some courts reject uncontradicted evidence of this kind, simply because it is Chinese, on the plea of its alleged inherent improbability, executive officers in the course of their "star-chamber" proceedings, may be relied upon to do so almost invariably, and from the point of view of such executive officers, every one who enters is "smuggled" in, and enters unlawfully. Hence, in large measure, arises the idea of extensive unlawful entries. The loose general allegations of the Government of "fraud" and "inherent improbability" in this class of cases, will not bear scrutiny.

(b) That applicants for admission, claiming to be citizens, need not before entry submit their claims to citizenship, to executive officers for consideration, because such officers would have no jurisdiction over them, is sustained, not merely by the decision of Judge WHEELER, quoted in our Chin Bak Kan and Chin Ying brief (p. 19), but by a line of unbroken decisions, in the lower federal courts, rendered both before and since the Act of August 1894, construed by this Court in the Lem Moon Sing case (158 U. S., 538)

In re Look Tin Sing 21 F. R. 905 (FIELD, J.).

In re Yung Sing Hee 36 F. R. 436.
Ex. p. Chin King 35 F. R. 354.
In re Tom Yum 64 F. R. 484 (Under Act of 1894).
Gee Fook Sing vs. U. S. 49 F. R. 146 (C C A).
In re Di Simone 108 F. R. 942.

Accordingly such persons need not make their application in the first instance to customs officers, having no jurisdiction over them, and wait either outside of the country or in confinement during the weeks or months during which such executive officers are conducting their *ex parte* examination of the case, and run the risk of being prejudiced in subsequent judicial proceedings by an unfavorable ruling by such executive officer, based on incompetent, undisclosed and perhaps non-existing evidence. Their neglect to do so, does not indicate fraud in any way.

(c) If there be fraud occasionally in such cases, as the Government contends, the Government can, through greater vigilance, exclude such persons, and require them to secure, as a means of testing *right of entry*, a writ of *habeas corpus*, or institute legal proceedings in accord with the "law of the land" and bills of rights for the determination of such questions as to persons who have entered and are actually enjoying the benefits of citizenship, and also, in appropriate cases, resort to the criminal laws prescribing penalties for unlawfully bringing in excluded persons, either Sections 2, 8, 11 and 16 of the Act of 1884 (23 Stat., 115), or substitutes therefor.

In fact, it is difficult to see why existing special statutes and judicial remedies do not meet the very

contingencies under consideration. Sec. 5428 of the Revised Statutes of the United States provides:

> "Every person who falsely represents himself to be a citizen of the United States, without having been duly admitted to citizenship, for any fraudulent purpose whatever, shall be punishable by a fine of not more than one thousand dollars, or be imprisoned not more than two years, or both.

It addition, it would seem that civil proceedings will also lie at the instance of the Government to test such claim to citizenship, by proceedings in the nature of *quo warranto* or the like (Territory of Nebraska vs. Lockwood, 3 Wallace, 236; Rex vs. Richmond, 6 T. R., 560; Reg. vs. Ireland, 9 B. & S., 19). These are the remedies the law affords for dealing with such claims to citizenship, and not the Chinese Exclusion Law procedure.

VI.

The Government's Claim that the Act of Sept. 13, 1888, providing for return of laborers went into effect and continued in force, and that Article II. of the Treaty was therefore not new legislation, is untenable.

This claim seems to be made as to Secs. 5 and 6 of the Act of Sept. 13, 1888. But, just as in the case of Section 12, of that Act, considered and held not to have gone into effect in the Li Sing case (180 U S 486) the Act of October 1st, 1888 is subsequent, and superseded the earlier provision, even if it could be

regarded as having been in force for any purpose. The treaty of 1894 therefore made in this respect, too, radical changes in the then-existing law, as it had been construed after the Act of Oct. 1, 1888 by this Court in the Chae Chan Ping case (130 U. S.).

VII.

The suggestion made by the Government that treaties should not be construed as superseding inconsistent prior statutes as to personal rights, as distinguished from property, is untenable.

If we have correctly apprehended this Government proposition as above formulated, we submit that it is not only novel and without support in authority, but clearly untenable. The Constitution makes treaties as well as statutes the supreme law of the land (Article VI.), and this is tantamount to contending that treaties cannot make provision with respect to personal rights. While this Court has indicated that there may be some limitations on the treaty-making power (Geofroy vs. Riggs, 133 U. S., 258, 267), they have no relation to this case, and there are no such limitations as contended for. In fact, these very treaties with China have been recognized by this Court as conferring personal rights on aliens (Yick Wo vs. Hopkins, 118 U. S., 356, 368-9; U. S. vs. Wong Kim Ark, 169 U. S., 649, 702).

(b) Moreover, the case of Geofroy vs. Riggs and the later cases in this Court, decided subsequent to Ware

vs. Hylton, all recognize that the intent to effect a repeal by treaty of a prior statute can more lightly be inferred than the converse case, because the treaty involves the additional element of international faith, in addition to mere legislation, and in construing a statute claimed to be inconsistent with a treaty, the canon of construction must be applied of finding unmistakably expressed legislative intent to violate treaty faith. Nor, either on principle or authority can the proposition be sustained, it is submitted, that a treaty is to be regarded as a general law, in its relations to prior special laws (Gov. Brief, p. 40). In its nature it has no such character. In fact, if such principle were to be applied, in view of the relations of treaties to State legislation as well as federal, it would seem to follow that definite references to every conceivable phase of voluminous State and federal law would be necessary, in order to supersede such "special" legislation, and that the foreign contracting sovereign is to be charged with knowledge of the law of every State, in all its details.

(c) The case of Geofroy vs Riggs is furthermore direct authority for the view that implications of treaties, as well as unmistakable, express terms, supersede inconsistent prior statutes.

VIII.

In conclusion, may we be permitted diffidently to submit to the Court, considerations with respect to the hardship that would result if the motions in these

cases as to the right to bail should not be decided, because possibly no longer of necessary practical moment in these very cases? Last December, on applying to Judge COXE for orders for bail in connection with the allowance of appeals to this Court, granted by him in several Chinese Exclusion cases involving also other questions than those here involved, that Judge suggested, in view of the doubtful question involved, that an application to this Court as to the bail orders should be made instead, the U. S. Attorney advised the Court that he had recommended that the Government raise the question by moving in this Court to vacate the orders for bail herein and Judge COXE accordingly directed the applications, for bail before him to stand over. Some of the men concerned have been in jail *for over a year*. After some time, the motions to vacate orders herein were made by the Government, and both sides joined in an earnest prayer to this Court for a determination of that question. In view of this situation, applications direct to the Court for bail in these other cases have not been made. In the interim, in other jurisdictions, Judge WHEELER and Judge ADAMS have, to counsel's knowledge, permitted bail on appeals from their orders, but the unfortunates in the Northern District of New York remain in close confinement.

B. LEWINSON.

MAX J. KOHLER,

Of Counsel for Chinese Defendants.

Supreme Court of the United States.

No. 503.—October Term, 1901.

The United States Appellant, vs. Lee Yen Tai. } On certificate from the United States Circuit Court of Appeals for the Second Circuit.

[April 21st 1902.]

Mr. Justice Harlan delivered the opinion of the Court.

This case is here upon a certified question of law arising in the Circuit Court of Appeals for the Second Circuit.

The facts out of which the question arose and the question itself are shown by the following statement sent up by that court:

"On the 8th day of October 1900 complaint was made under oath before a commissioner of the United States for the Northern District of New York, charging that Lee Gin Moy, *alias* Lee Yen Tai, on the sixth day of October A. D. 1900 'did unlawfully come into the United States from China, he being then and there a Chinese person and laborer, and not being a diplomatic or other officer of the Chinese or any other Government, and without producing the certificate required of Chinese persons seeking to enter the United States, and that he was not entitled to be or remain within the United States.' A warrant for said defendant's arrest was issued by said United States commissioner on the same day, and after a hearing before said commissioner he issued a warrant of deportation in which the following adjudication was placed on record:

"'I now hereby find and adjudge that the said Lee Gin Moy is a Chinese person and laborer; that he is not a diplomatic or other officer of the Chinese, or of any other Government, and unlawfully entered the United States as charged in said complaint; and I further adjudge him, said Lee Gin Moy, guilty of not being lawfully entitled to be or remain in the United States.'

"Said defendant's immediate removal to China by the United States Marshal for said Northern District of New York upon said warrant was ordered by said commissioner. While the marshal had him in custody, and in process of deportation, *habeas corpus* was issued by the District Court for the Southern District of New York. The petition upon which the writ of *habeas corpus* issued averred, among other things, that said Lee Yen Tai was a merchant having an interest of one thousand

dollars ($1,000) in the capital of the firm, and is not a laborer, and has not been a laborer, but is a merchant and member of a firm specified in the petition, and has always been a merchant since he had any status.

"Before the District Court the prisoner was produced, and a return made which included the aforesaid warrant of deportation; said return was traversed and no evidence as to defendant's status other than the allegations in the aforesaid petition and return was before the District Court. Upon the hearing in the District Court the petitioner was discharged upon giving bail for his appearance as may be determined by any final order on appeal. Appeal was duly taken by the United States to this court."

By the preamble of the act of May 6th, 1882, *c.* 126, it was declared that in the opinion of the Government of the United States the coming of Chinese laborers to this country endangered the good order of certain localities within our territory. It was therefore provided that from and after the expiration of ninety days from the above date, and until the expiration of ten years from such date, the coming of Chinese laborers to the United States should be suspended, and during such suspension it was made unlawful for any Chinese laborer to come, or having come after the expiration of said ninety days, to remain within the United States. § 1. Penalties were imposed upon the master of any vessel who should knowingly bring within the United States on his vessel and land or permit to be landed any Chinese laborer from any foreign port or place. § 2. In order to identify such Chinese as were entitled, under the treaty of November 17th 1880, 22 *Stat.* 826, to go from and come to the United States of their free will and accord, provision was made for certificates to be granted to such persons. § 4.

The twelfth section of the above act was as follows:

"That no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel. And any Chinese person found unlawfully within the United States shall be caused to remove therefrom to the country from whence he came, by direction of the President of the United States, and at the cost of the United States, after being brought before some justice, judge or commissioner of a court of the United States and found to be one not lawfully entitled to be or remain in the United States." 22 *Stat.* 58, 61.

By the act of July 5th 1884, *c.* 220, the twelfth section of the above act of May 6th 1882 was amended so as to read as follows:

"That no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel. And any Chinese person found unlawfully within the United States shall

be caused to be removed therefrom to the country from whence he came, and at the cost of the United States, after being brought before some justice, judge or commissioner of a court of the United States and found to be one not lawfully entitled to be or to remain in the United States; and in all such cases the person who brought or aided in bringing such person to the United States shall be liable to the Government of the United States for all necessary expenses incurred in such investigation and removal; and all peace officers of the several States and Territories of the United States are hereby invested with the same authority as a marshal or United States marshal in reference to carrying out the provisions of this act or the act of which this is amendatory, as a marshal or deputy marshal of the United States, and shall be entitled to like compensation to be audited and paid by the same officers. And the United States shall pay all costs and charges for the maintenance and return of any Chinese person having the certificate prescribed by law as entitling such Chinese person to come into the United States who may not have been permitted to land from any vessel by reason of the provisions of this act." 23 *Stat.* 115, 117, 118.

Subsequently, by the act of May 5th 1892, *c.* 60, entitled "An act to prohibit the coming of Chinese persons into the United States," it was provided that "all laws now [then] in force prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent are hereby continued in force for a period of ten years from the passage of this [that] act." 27 *Stat.* 25, § 1.

The question certified to us is whether the twelfth section of the act of 1882, amended and continued in force as above stated, was abrogated by the treaty with China proclaimed December 8th 1894. 28 *Stat.* 1210.

As this question cannot be properly disposed of without examining the entire treaty, the provisions of the treaty are here given in full:

"Whereas, on the 17th day of November A. D. 1880, and of Kwanghsii the sixth year, tenth moon, fifteenth day, a treaty was concluded between the United States and China, for the purpose of regulating, limiting or suspending the coming of Chinese laborers to, and their residence in, the United States;

"And whereas the Government of China, in view of the antagonism and much deprecated and serious disorders to which the presence of Chinese laborers has given rise in certain parts of the United States, desires to prohibit the emigration of such laborers from China to the United States;

"And whereas the two Governments desire to co-operate in prohibiting such emigration, and to strengthen in other ways the bonds of friendship between the two countries;

"And whereas the two Governments are desirous of adopting reciprocal measures for the better protection of the citizens or subjects of each within the jurisdiction of the other;

"Now, therefore, &c. . . .

"ART. I. The high contracting parties agree that for a period of ten years, beginning with the date of the exchange of the ratifications of this convention, the coming, except under the conditions hereinafter specified, of Chinese laborers to the United States shall be absolutely prohibited.

"ART. II. The preceding article shall not apply to the return to the United States of any registered Chinese laborer who has a lawful wife, child or parent in the United States, or property therein of the value of one thousand dollars, or debts of like amount due him and pending settlement. Nevertheless, every such Chinese laborer shall, before leaving the United States, deposit, as a condition of his return, with the collector of customs of the district from which he departs, a full description in writing of his family, or property, or debts, as aforesaid, and shall be furnished by said collector with such certificate of his right to return under this treaty as the laws of the United States may now or hereafter prescribe and not inconsistent with the provisions of this treaty; and should the written description aforesaid be proved to be false, the right of return thereunder, or of continued residence after return, shall in each case be forfeited. And such right of return to the United States shall be exercised within one year from the date of leaving the United States; but such right of return to the United States may be extended for an additional period, not to exceed one year, in cases where by reason of sickness or other cause of disability beyond his control, such Chinese laborer shall be rendered unable sooner to return—which facts shall be fully reported to the Chinese consul at the port of departure, and by him certified, to the satisfaction of the collector of the port at which such Chinese subject shall land in the United States. And no such Chinese laborer shall be permitted to enter the United States by land or sea without producing to the proper officer of the customs the return certificate herein required.

"ART. III. The provisions of this Convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants or travellers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States, they may produce a certificate from their Government or the Government where they last resided viséd by the diplomatic or consular representative of the United States in the country or port whence they depart.

"It is also agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the Government of the United States as may be necessary to prevent said privilege of transit from being abused.

"ART. IV. In pursuance of Article III of the Immigration Treaty between the United States and China, signed at Peking on the 17th day

of November, 1880, (the 15th day of the tenth month of Kwanghsii, sixth year,) it is hereby understood and agreed that Chinese laborers or Chinese of any other class, either permanently or temporarily residing in the United States, shall have for the protection of their persons and property all the rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens. And the Government of the United States reaffirms its obligation, as stated in said Article III, to exert all its power to secure protection to the persons and property of all Chinese subjects in the United States.

"ART. V. The Government of the United States, having by an act of Congress, approved May 5th 1892, as amended by an act approved November 3d 1893, required all Chinese laborers lawfully within the limits of the United States before the passage of the first named act to be registered as in said act provided, with a view of affording them better protection, the Chinese Government will not object to the enforcement of such acts, and reciprocally the Government of the United States recognizes the right of the Government of China to enact and enforce similar laws or regulations for the registration, free of charge, of all laborers, skilled or unskilled, (not merchants as defined by said act of Congress,) citizens of the United States in China, whether residing within or without the treaty ports. And the Government of the United States agrees that within twelve months from the date of the exchange of the ratifications of this convention, and annually, thereafter, it will furnish to the Government of China registers or reports showing the full name, age, occupation and number or place of residence of all other citizens of the United States, including missionaries, residing both within and without the treaty ports of China, not including, however, diplomatic and other officers of the United States residing or travelling in China upon official business, together with their body and household servants.

"ART. VI. This Convention shall remain in force for a period of ten years beginning with the date of the exchange of ratifications, and, if six months before the expiration of the said period of ten years, neither Government shall have formally given notice of its final termination to the other, it shall remain in full force for another like period of ten years." 28 *Stat.* 1210.

The first proposition made on behalf of the defendant is that the treaty of 1894 should be construed as covering the whole subject of Chinese exclusion, and that its failure to prescribe any judicial procedure for deportation, or to continue in force any prior statute on that subject, shows that the Commissioner was without jurisdiction.

If the words of the treaty of 1894, reasonably interpreted, indicate a purpose to cover the whole subject of Chinese exclusion—including the

methods to be employed to effect that result—then the proceedings against the defendant before the Commissioner were without authority of law; for the treaty itself does not provide any particular method by which Chinese laborers may be prevented from entering the United States, or for sending them out of the country if they illegally enter, although both nations expressed in the treaty a desire to co-operate in preventing the immigration or coming to this country of such persons. China itself recognized it to be its duty to co-operate with the United States to that end, "in view of the antagonism and much deprecated and serious disorders to which the presence of Chinese laborers has given rise in certain parts of the United States." As both countries were agreed that this result should be attained, the court ought to hesitate to adopt any construction of the treaty that would tend to defeat the object each had in view. We must assume that the two Governments knew that a general prohibition of the coming of Chinese laborers to the United States would be ineffectual if no provision were made for determining whether a particular Chinaman seeking to enter the country, and whose right to enter was denied, belonged to the class prohibited from coming within our territorial limits.

It is not disputed that such provision exists if section 12 of the act of May 6th 1882, as amended by the act of July 5th 1884, and as continued in force by the act of May 5th 1892, be held not to have been repealed or superseded by the treaty of 1894.

That it was competent for the two counties by treaty to have superseded a prior act of Congress on the same subject is not to be doubted; for otherwise the declaration in the Constitution that a treaty, concluded in the mode prescribed by that instrument, shall be the supreme law of the land, would not have due effect. As Congress may by statute abrogate, so far at least as this country is concerned, a treaty previously made by the United States with another nation, so the United States may by treaty supersede a prior act of Congress on the same subject. In *Foster & Elam* v. *Neilson*, 2 *Pet.* 253, 314, it was said that a treaty was "to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision." In the case of *The Cherokee Tobacco*, 11 *Wall.* 616, 621, this court said "a treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty." So in the *Head Money Cases*, 112 *U. S.* 580, 599, this court said: "So far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification or repeal." Again, in *Whitney* v. *Robertson*, 124 *U. S.* 190, 194: "By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior

efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always that the stipulation of the treaty on the subject is self-executing." See also *Taylor* v. *Morton*, 2 *Curtis*, 454, 459; *Clinton Bridge Case*, 1 *Woolworth*, 155; *Ropes* v. *Church*, 8 *Blatchf*, 304; 2 *Story on Const.*, § 1838. Nevertheless, the purpose by statute to abrogate a treaty or any designated part of a treaty, or the purpose by treaty to supersede the whole or a part of an act of Congress, must not be lightly assumed, but must appear clearly and distinctly from the words used in the statute or in the treaty.

In the case of statutes alleged to be inconsistent with each other in whole or in part, the rule is well established that effect must be given to both, if by any reasonable interpretation that can be done; that "there must be a positive repugnancy between the provisions of the new laws and those of the old; and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy;" and that "if harmony is impossible, and only in that event, the former is repealed in part or wholly, as the case may be." *Wood* v. *United States*, 16 *Pet.* 342, 363; *United States* v. *Tynen*, 11 *Wall.* 88, 93; *State* v. *Stoll*, 17 *Wall.* 425, 431. In *Frost* v. *Wenie* 157, *U. S.* 46, 58, this court said: "It is well settled that repeals by implication are not to be favored. And when two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same object, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and, therefore, to displace the prior statute."

The same rules have been applied where the claim was that an act of Congress had abrogated some of the provisions of a prior treaty between the United States and China. *Chew Heong* v. *United States*, 112 *U. S.* 536, 550. In that case it was held that the treaty could stand with the subsequent statutes, and, consequently, it was enforced.

Like principles must control when the question is whether an act of Congress has been superseded in whole or in part by a subsequent treaty. A statute enacted by Congress expresses the will of the People of the United States in the most solemn form. If not repugnant to the Constitution, it is made by that instrument a part of the supreme law of the land, and should never be held to be displaced by a treaty, subsequently concluded, unless it is impossible for both to stand together and be enforced. So far from there being any inconsistency between the statute and treaty

here in question, the twelfth section of the act of 1882, as amended in 1884 and continued in force for ten years from and after the passage of the act of 1892, is in absolute harmony with the treaty and can be enforced without affecting or impairing any right secured by the treaty. On the contrary, the enforcement of that section as amended will serve to advance the purpose of the two countries in respect of Chinese laborers, as avowed in the treaty of 1894. Despite the ingenious argument to the contrary, we do not perceive any difficulty whatever in reaching this conclusion, after carefully scrutinizing the treaty and the statute. A different conclusion would be hostile to the objects which, as avowed in the treaty, both the United States and China desired to accomplish. This is so clearly manifest that argument cannot, as we think, make it more so.

The question certified is answered in the negative, and an order so declaring will be sent to the Circuit Court of Appeals.

Mr. Justice GRAY did not hear the argument and took no part in the decision.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 525.—October Term, 1901.

Chin Bak Kan, Appellant, *vs.* The United States. } Appeal from the District Court of the United States for the Northern District of New York.

[June 2, 1902.]

Complaint under oath was duly made before a commissioner of the United States for the Northern District of New York, charging "that Chin Bak Kan did, on or about the 13th day of March, 1901, at Burke in said district, knowingly and wrongfully come from Canada, in the province of Quebec, into the Northern District of New York, to wit: into Burke in the county of Franklin and State of New York, in the United States, he, the said Chin Bak Kan being then and there a Chinese person and laborer, and a person prohibited by the laws of the United States of America from being and remaining in the United States, and he, the said Chin Bak Kan, then and there being such Chinese person as aforesaid, was then and there found unlawfully in the United States at Burke aforsaid, in violation of the acts of the Congress in such case made and provided."

A warrant for the apprehension of Chin Bak Kan was issued March 13, 1901, and he was arrested and brought before the commissioner. He was informed of the charge against him, advised that he would be permitted to make a statement without or with oath, or to refuse to make any statement or to answer any question put to him, and was entitled to reasonable time to send for counsel and procure the attendance of witnesses. He pleaded not guilty to the charge, "but admitted that he had just come into the United States." He was thereafter represented by counsel. Subsequently a hearing and trial was commenced before the commissioner who issued the warrant. That officer having been taken sick, the hearing was continued and concluded before another commissioner, who found and adjudged upon the evidence as follows: "I now hereby find and adjudge that the said Chin Bak Kan is a Chinese person and laborer, that he is not a diplomatic or other officer of the Chinese or any other government, and unlawfully entered the United States, as charged in said complaint. And I further adjudge him, said Chin Bak Kan, guilty of not being lawfully entitled to be or remain in the United States. I further find and adjudge that he, said Chin Bak Kan, came from the Empire of China, but he has not made it appear to me that he was a subject or citizen of some other country than China. And I hereby order and adjudge said Chin Bak Kan to be imme-

diately removed from the United States to the Empire of China. A certified copy of this judgment shall be the process upon which said removal of said Chin Bak Kan shall be made from the United States to the Empire of China. And said process shall be executed by the Hon. C. D. MacDougall, United States marshal for said district."

An appeal was prosecuted to the District Court of the United States for the Northern District of New York, but the appeal was dismissed and the judgment for the deportation of the defendant was affirmed.

From the final order of the District Court an appeal was then taken to this court.

Mr. Chief Justice FULLER delivered the opinion of the Court:

By section one of the act of May 6, 1882, (22 Stat. 58, c. 126,) it was provided that from and after the expiration of ninety days, and until the expiration of ten years, the coming of Chinese laborers to the United States should be suspended, and during such suspension it was made unlawful for any Chinese laborer to come, or, having come after the expiration of said ninety days, to remain within the United States.

By section four provision was made for certificates to be granted to such Chinese as were entitled under the treaty of November 17, 1880, to go from, or come to, the United States, of their free will and accord, in order to identify them.

The twelfth section of the act was as follows: "That no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel. And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, by direction of the President of the United States, and at the cost of the United States, after being brought before some justice, judge, or commissioner of a court of the United States and found to be one not lawfully entitled to be or remain in the United States."

This section was amended by the act of July 5, 1884, (23 Stat. 115, c. 220,) so as to read as follows: "That no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel. And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, and at the cost of the United States, after being brought before some justice, judge, or commissioner of a court of the United States and found to be one not lawfully entitled to be or to remain in the United States; and in all such cases the person who brought or aided in bringing such person to the United States shall be liable to the

government of the United States for all necessary expenses incurred in such investigation and removal; and all peace officers of the several States and Territories of the United States are hereby invested with the same authority as a marshal or United States marshal in reference to carrying out the provisions of this act or the act of which this is amendatory, as a marshal or deputy marshal of the United States, and shall be entitled to like compensation, to be audited and paid by the same officers. And the United States shall pay all costs and charges for the maintenance and return of any Chinese person having the certificate prescribed by law as entitling such Chinese person to come into the United States, who may not have been permitted to land from any vessel by reason of any of the provisions of this act."

By section one of the act of May 5, 1892, (27 Stat. 25, c. 60,) it was provided: "That all laws now in force prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent are hereby continued in force for the period of ten years from the passage of this act."

Sections two, three and six were as follows:

"SEC. 2. That any Chinese person or person of Chinese descent, when convicted and adjudged under any said laws to be not lawfully entitled to be or remain in the United States, shall be removed from the United States to China, unless he or they shall make it appear to the justice, judge, or commissioner before whom he or they are tried that he or they are subjects or citizens of some other country, in which case he or they shall be removed from the United States to such country: *Provided*, That in any case where such other country of which such Chinese person shall claim to be a citizen or subject shall demand any tax as a condition of the removal of such person to that country, he or she shall be removed to China.

"SEC. 3. That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States."

"SEC. 6. And it shall be the duty of all Chinese laborers within the limits of the United States, at the time of the passage of this act, and who are entitled to remain in the United States, to apply to the collector of internal revenue of their respective districts, within one year after the passage of this act, for a certificate of residence, and any Chinese laborer, within the limits of the United States, who shall neglect, fail, or refuse to comply with the provisions of this act, or who, after one year from the passage hereof, shall be found within the jurisdiction of the United States without such certificate of residence, shall be deemed and adjudged to be unlawfully within the United States, and may be arrested, by any United States customs official, collector of internal revenue or his deputies, United States marshal or his deputies, and taken before a United States judge, whose duty it shall be to order that he be deported from the United States as hereinbefore provided, unless he shall establish clearly to the satisfaction of said judge, that by reason of accident, sickness or other unavoidable cause, he has been unable to procure his certificate, and to the satisfaction

of the court, and by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act; and if upon the hearing, it shall appear that he is so entitled to a certificate, it shall be granted upon his paying the cost.

"Should it appear that said Chinaman had procured a certificate which has been lost or destroyed, he shall be detained and judgment suspended a reasonable time to enable him to procure a duplicate from the officer granting it, and in such cases, the cost of said arrest and trial shall be in the discretion of the court.

"And any Chinese person other than a Chinese laborer, having a right to be and remain in the United States, desiring such certificate as evidence of such right may apply for and receive the same without charge."

Section six was amended by the act of November 3, 1893, (28 Stat. 7, c. 14.)

Article I of the treaty with China, proclaimed November 8, 1894, (28 Stat. 1210,) was: "The high contracting parties agree that for a period of ten years, beginning with the date of the exchange of the ratifications of this convention, the coming, except under the conditions hereinafter specified, of Chinese laborers to the United States shall be absolutely prohibited."

Article II provided: "The preceding article shall not apply to the return to the United States of any registered Chinese laborer who has a lawful wife, child, or parent in the United States, or property therein of the value of one thousand dollars, or debts of like amount due him and pending settlement. . . . And no such Chinese laborer shall be permitted to enter the United States by land or sea without producing to the proper officer of the customs the return certificate herein required."

Article V: "The government of the United States, having by an act of the Congress, approved May 5, 1892, as amended by an act approved November 3, 1893, required all Chinese laborers lawfully within the limits of the United States before the passage of the first named act to be registered as in said act provided, with a view of affording them better protection, the Chinese government will not object to the enforcement of such acts, and reciprocally the government of the United States recognizes the right of the government of China to enact and enforce similar laws or regulations for the registration, free of charge, of all laborers, skilled or unskilled, (not merchants as defined by said acts of Congress,) citizens of the United States in China, whether residing within or without the treaty ports."

In *United States* v. *Lee Yen Tai*, just decided, the question was propounded to us by the Circuit Court of Appeals for the Second Circuit on certificate: "Is section 12 of 'An act to execute certain treaty stipulations relating to the Chinese, approved May 6, 1882,' as amended by section 3 of the amendatory act of July 5, 1884, repealed by the treaty or convention with China of December 8, 1894?" and that question we answered in the negative.

The act of March 3, 1901, (31 Stat. 1093, c. 845,) provides:

"That it shall be lawful for the district attorney of the district in which any Chinese person may be arrested for being found unlawfully within the United States, or having unlawfully entered the United States, to designate the United States commissioner within such district before whom such Chinese person shall be taken for hearing.

"SEC. 2. That a United States commissioner shall be entitled to receive a fee of five dollars for hearing and deciding a case arising under the Chinese exclusion laws.

"SEC. 3. That no warrant of arrest for violations of the Chinese exclusion laws shall be issued by the United States commissioners excepting upon the sworn complaint of a United States district attorney, assistant United States district attorney, collector, deputy collector, or inspector of customs, immigration inspector, United States marshal, or deputy United States marshal, or Chinese inspector, unless the issuing of such warrant of arrest shall first be approved or requested in writing by the United States district attorney of the district in which issued."

The errors assigned may be grouped into those which presented the question of the effect of the treaty of 1894 by way of repeal, and these have been disposed of by our decision in *United States* v. *Lee Yen Tai*, *ante*, ——; those in respect of the assertion of citizenship and the action taken thereon; and certain objections of want of jurisdiction because of insufficiency of the complaint. The latter relate to lack of positive averment of the facts, and as to the official character of the person who made the complaint. The complaint was made by one Ketchum, and, although it was not therein stated, it appears from the official register of the government that he was a Chinese inspector, and as such authorized under the statute.

The charge was made on information and belief, but no objection was raised to the complaint on that ground, and we think the ruling in *Fong Yue Ting* v. *United States*, 149 U. S. 729, applies that defects in complaint or pleadings do not affect the authority of the commissioner or judge or the validity of the statute.

Something is said in respect of want of jurisdiction in the commissioner because section six of the act of 1892 provides that Chinese laborers without certificates may be "taken before a United States judge;" but we concur in the views of the Circuit Court of Appeals for the Ninth Circuit in *Fong Mey Yuk* v. *United States*, 113 Fed. Rep. 898, that the act is satisfied by proceeding before "a justice, judge, or commissioner." These are the words used in section twelve of the act of 1882; section twelve of the act of 1884; section thirteen of the act of 1888; and section three of the act of 1892; while the first section of the act of March 3, 1901, explicitly authorizes the district attorney to designate the commissioner before whom the Chinese person may be brought. The words "United States judge," "judge" and "court," in section six, seem to us to refer to the tribunal authorized to deal with the subject, whether composed of a justice, a judge,

or a commissioner. A United States commissioner is a *quasi* judicial officer, and in these hearings he acts judicially. Moreover, this case was taken by appeal from the commissioner to the judge of the district court, and his decision was affirmed, so that there was an adjudication by a United States judge in the constitutional sense as well as by the commissioner acting as a judge in the sense of the statute.

But it is argued that the commissioner had no jurisdiction to act because the claim of citizenship was made. The ruling in *United States* v. *Wong Kim Ark*, 169 U. S. 649, was to this effect: "A child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States." It is impossible for us to hold that it is not competent for Congress to empower a United States commissioner to determine the various facts on which citizenship depends under that decision.

By the law the Chinese person must be adjudged unlawfully within the United States unless he "shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States." As applied to aliens there is no question of the validity of that provision, and the treaty, the legislation, and the circumstances considered, compliance with its requirements cannot be avoided by the mere assertion of citizenship. The facts on which such a claim is rested must be made to appear. And the inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency, without being able to show that it was ever possessed.

Section thirteen of the act of September 13, 1888, provides that any Chinese person, or person of Chinese descent, found unlawfully in the United States, may be arrested on a warrant issued upon a complaint under oath, "by any justice, judge, or commissioner of any United States court," and when convicted, on a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, shall be removed to the country whence he came. "But any such Chinese person convicted before a commissioner of the United States court may, within ten days from such conviction, appeal to the judge of the District Court for the district."

It seems to have been assumed, during the years following the date of the act, and is conceded by the United States, that although most of its provisions were dependent upon the ratification of the treaty of March 12, 1888, and failed with the failure of ratification, that this section is in and of itself independent legislation and in force as such. Accordingly in this

case an appeal was taken from the judgment of deportation rendered by the commissioner to the judge of the District Court of the United States for the Northern District of New York, and, upon hearing, the District Court affirmed that judgment. From the judgment of the District Court, this appeal was taken under section five of the act of March 3, 1891, on the ground that the construction of the treaty of 1894 was drawn in question. Except in cases under that section where the question of jurisdiction alone is certified, we have power to dispose of the entire case, but as the jurisdiction of the commissioner is sustained, we are of opinion that we cannot properly re-examine the facts already determined by two judgments below. That is the general rule, and there is nothing to take this case out of its operation, and, on the contrary, the conclusion is, *a fortiori*, justified. The same reasoning in respect to the authority to exclude applies to the authority to expel, and the policy of the legislation in respect to exclusion and expulsion is opposed to numerous appeals. And we are not disposed to hold that where a Chinese laborer has evaded the executive jurisdiction at the frontier and got into the country, he is therefore entitled to demand repeated rehearings on the facts.

Judgment affirmed.

No. 526.

Chin Ying, Appellant, *vs.* The United States. } Appeal from the District Court of the United States for the Northern District of New York.

Mr. Chief Justice FULLER: This case is similar to that just decided, and the judgment of the court below is

Affirmed.

Mr. Justice GRAY did not hear the argument and took no part in these decisions.

Mr. Justice BREWER and Mr. Justice PECKHAM dissented.

True copy.

Test:

Clerk Supreme Court, U. S.